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Jay C. Newman
Room 201
P.O. Bldg.
San Francisco

Jay C. Newman
1348 South 15th East Street
Salt Lake City, 5, Utah



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LEGAL REASONING

AND

BRIEFING

LOGIC APPLIED TO THE PREPARATION, TRIAL
AND APPEAL OF CASES, WITH
ILLUSTRATIVE BRIEFS
AND FORMS

BY

JESSE FRANKLIN BRUMBAUGH, A. M., LL. B.

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TO MY HIGHLY ESTEEMED AND DISTINGUISHED FRIEND
AND CURATOR OF LAW, THE
HONORABLE UNITED STATES SENATOR
THOMAS STERLING,

FORMERLY DEAN OF THE LAW SCHOOL OF THE
UNIVERSITY OF SOUTH DAKOTA,

TO WHOSE LEARNED INSTRUCTION THE AUTHOR IS GREATLY
INDEBTED, THIS VOLUME IS AFFECTIONATELY
DEDICATED.

PREFACE

The present volume is based upon an experience of several years in training students in the art of public speaking and argumentation and several years more in teaching Logic, Brief Drawing and Common-Law Pleading. The author's observation and study has led him to believe that a more thorough understanding of the principles of logic and argumentation in relation to the practice of law is needed by the practitioner than can be gained from a cursory study of rhetoric and argumentation as taught in schools of higher learning. So far as the author is aware, no work has yet appeared to supply a distinctly professional treatment of these subjects from a legal point of view.

Added to this phase of the work is appended a detailed discussion of the principles of briefing covering not only the appeal brief, but the trial, court, and jury brief as well. Some long practiced but heretofore unsystematized principles and methods are here more formally presented and elaborately illustrated by specimen briefs of actual cases prepared and argued before the courts. It is believed that the work will prove of practical value.

J. F. B.

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LEGAL REASONING AND BRIEFING

PART ONE

LEGAL REASONING

CHAPTER I.

INTRODUCTION.

The influence of logic upon law arises from the one fundamental fact, that laws are not self-applicable—and a rule of law isolated from a world of fact is no more than a speculative ghost. Principles “live, move, and have their being”—as indicators for the controlling of facts.

Law, accurately speaking, is organized principle, and from a political point of view, is the chart by which human action, in terms of fact, is regulated. Manifestly, the inertia of such a nonautomatic machine calls for a force to give it vitality and action, as well as a supplementary art of manipulation. Such energy must be supplied by human life, and the art by human skill. Briefly then, the function of logical reasoning in connection with law is to secure the efficient application of legal principles. Dr. Johnson's definition of lawyers, as recorded by Boswell, contains much of the meat of the matter. “Lawyers,” he says, “are a class of the community who by study and experience have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled.”

However, the practical application of legal rules implies, we shall later see, the superimposing of one species of law

upon another, and this makes expedient at the outset a general survey of the subject.

Law is a broad term and used freely by science in whatever field system and order is manifest. Nevertheless, it may be said to serve two general purposes: one, interpretative merely of facts as they exist, and from which information they may be prophesied to exist in the future, and an inference made that they have existed in the past. The uniformity here involved may also be said to have been merely discovered. Some control over the field of fact may also be acquired, but no penalties are prescribed as such for the nonenforcement of such control. This is law as revealed in the distinctive fields of natural science. Such principles are usually accredited to the agency of a Supreme Being. On this natural side, society exists and achieves in an interacting universe, physical on the one hand, and mental on the other. Both sides of this field are subject to special laws inherent and immutable. Their outer human origin is obvious and undisputed. But, set over and contrasted with this conception of law is another, which is normative, creative and regulative in its meaning.

Confronting a field of natural law which is practically unchangeable the great problem of reasonable man is not to combat the inevitable, but to so conduct himself that, through skilful adjustment to the first field of law, he may rise to a superior realization of himself. Such a system of adjustment projects the need of a second field of law, man-made and regulative, as an instrumentality to bring and hold human activity into alignment with natural law. Here, then, we have two fundamental species of law: the one inherent in the constitution of things, a world system, immutable and relatively fixed; and the other, a creation of the wisdom of man, localized to a particular territory, and modifiable according to circumstances.

But law, according to either conception or species, must

not be mistaken for a force. Herbert Spencer once reminded Charles Kingsley of this careless use of the term. For example, it is common to speak of the law of gravitation drawing objects to the earth, overlooking for the moment that the law and the force of gravitation are two different things. Manifestly, the uniformity, which is the essence of law, has no inherent power to exert itself. The law is but a uniform way in which a certain force is revealed to operate or prescribed to operate. Force makes the record which we term law and also enforces it. Many a law in science has been cautiously watched because no force appeared to be behind it, and many a law has become obsolete upon the statute books for want of a public energy to find expression through it. In short, laws do not make the world go round nor people go thus and so,—energy behind the law does that.

We thus perceive that the force which puts law to work is an important factor. Indeed, the need of such force is the genesis of the legal profession. With the force supplied, it must be properly directed, and hence arises the function of law as a practical art. No art, however, exists of such a utilitarian character which is not merely a means to an end. The laws to be applied are rules of action, but the very application of a system of rules to subject-matter invokes a science and method of its own. Thus the rules of substantive law must be applied through a system of procedure, called attributive or adjective Law. Hence the profession of law demands a knowledge of the system of rules to be applied and a further knowledge of the system of rules by which they are to be applied. It is the latter field of method to which the following discussion will be limited.

The philosophy of law is this: man may regulate his conduct by human-made laws, but only in so far as to conform to the more fundamental laws of existence in general. In

fact, human laws are only valuable to him in the solution of his life problem to the degree to which they conform and work back into the larger plan of the universe out of which they spring. Man can not develop in defiance of his own body and mind, nor of the earth upon which he lives. Human laws should, therefore, be supplementary to natural laws, neither antagonistic nor separated from them by a chasm. The crux of the situation, however, is that the finiteness of man's knowledge and wisdom, together with his proneness to moral laxity, has made such a conflict and chasm an inevitable reality. Nevertheless, it is the supreme work of the lawmaker, interpreter, and advocate to constantly eliminate, as life becomes more complex, this breach between the natural and higher ethical system, and the laws of the State in which he lives.

We desire next to point out that while the laws of mind have been impacted into the very structure of law itself in the process of making and again in the process of interpretation, yet, when it comes to the method of legal application, a number of special modifications and limitations are imposed upon the principles of formal logic in order to doubly insure its rules against error, on the one hand, and to relax its rigidity in favor of practical efficiency upon the other. It may truly be said, therefore, that there is a system of legal logic as distinguished from the general science of reasoning, and which is even more rigid in many respects, while at the same time more adaptable to gross and uncertain data. The failure to recognize this plan, at once more rigid, and at the same time more elastic, has given rise to a popular paradox between law and ethics. Let us consider how such an antithesis is made possible.

In at least four different directions law modifies the rules and usages of ordinary and formal logic, to wit: 1. In the content of its terms; 2. In the order and formulation of its premises; 3. In the field of evidence; 4. In the imposition of

moral and legal penalties. Naturally results reached through a system somewhat different from that employed in current reasoning must often prove perplexing, preposterous, and many times highly reprehensible to the mind of the uninitiated public.

First of all, the foundation for the apparent conflict is grounded in the fact that the terms in their meaning, as used in general reasoning, are an uncertain, crudely bounded, and variable factor, determined only by a consensus, when such exists, of the scientific and popular usage of the day; whereas the content and meaning of the terms in legal logic are fixed and true, as made so and defined by hypothesis—that is, the latter are concepts rigidly formulated and established by legal construction and precedent, sometimes including more, sometimes less, and often elements quite different from what the same word or phrase may have in common usage.

Ordinary logic accepts the content of terms as it finds them, and many times they are vague and indefinite, but legal logic finds it essential to make deliberately and with much precision its own terms. Thus the word “nuisance” in legal force is considerably more restricted than is its popular application. Again, the word “malice”, in common usage, emphasizes an element of feeling, but in law this element is sometimes altogether absent. So also such words as intent, notice, and deceit found in great numbers have a width of popular significance materially conditioned in their legal import. In fact, there are hundreds of limitations imposed by law upon the phraseology and vocabulary of law.

Now the paradox arises as follows: Law is not only corrective in purpose, but especially preventative as well. It operates not exclusively to set aright a set of facts harboring injustice, but publishes a rule in advance to every individual as to what acts are lawful and unlawful. As a consequence, the application of law involves a judgment of conduct, and

hence pronounces an act to be legally right or wrong. Here is where an issue arises. Before us is an individual whom society, by methods which to it at least reach convincing conclusions, judges to be a criminal, and to have committed a criminal act, yet when brought to trial, from a lack of evidence properly produced, is released as innocent. The public mind at once condemns the law as being unethical.

Of course, from the point of view of ordinary reasoning the conclusion is correct, but from the point of view of legal logic, no error has been committed. And although the difference between legal and nonlegal logic is responsible, yet the difference is plainly unavoidable. There must always be a distinction between the ideal and the real, however earnestly the real may strive to become and realize the ideal. And so it is in law. We are compelled to believe, and do believe, that law strives to be ethical in the higher sense, otherwise it would be repugnant to justice, for law, as a system, is a means dedicated to promote man's highest moral nature in the larger sphere of the universe. Why then any contradiction? Simply this: human-made laws may strive to attain and reflect the larger ideal which is conceived to be morally perfect only so far as the insight and goodness of man will allow, and it is practically impossible for statutory law to keep apace with such an ever-improving ideal, or to conform except partially to such an imperfectly apprehended system. The result is a double standard—that of moral law in the perfect ideal cherished with more or less enthusiasm in the public mind, and that of legal law temporarily fixed, and as far as possible an expression of the former embodied in the statutes and customs of the country. That the two are not identical is to the unreflective a demoralizing weakness of the law and often unjustly attributed to the callousness of the legal profession.

Moreover, the logical divergence between the practical concepts of law and the ideal concepts of general thought lead

not only to a legal logic but also to a legal ethics as already suggested. For instance in applying law to an offense, the question is not, as it may be supposed, whether the individual is guilty—with that the law has nothing directly to do, but rather, whether the law makes the act alleged an offense and whether it can prove that this individual committed said act. Thus legal guilt and moral guilt are not the same thing. Moral guilt is a subjective, personal, ethical matter; legal guilt an objective, social, legal matter. The first exists by virtue of a man being a free, responsible agent, in the larger, ideal, ethical sphere; the second, by virtue of being a socially restricted animal in a political sphere. No contradiction exists, then, to find a man morally guilty of a crime and yet legally innocent, for with law it is all a question of proper proof. Moral guilt is a question of what the man has done; legal guilt of what the law has proven him to have done. Conversely, through the imperfection of the system and the lack of human omniscience, a person may be legally condemned yet morally innocent.

And again, in passing judgment upon acts themselves, the same contrast is observable. Law may make a thing legal by statute or decision of the court, and hence legally good, which is in itself morally bad, and vice versa, may make a thing legally bad, which is in itself morally good. The question is, which is right? And the answer is, both. And this from the singular fact that each applies only to its own sphere, since law, by making its own concepts, makes also its own logic, to that degree, makes also in the same process its own ethics. Law recognizes this fact in construing a legal distinction between things, “*malum in se*”, and things, “*malum prohibitum*”, that is, some things are bad in the higher moral sphere, and others bad merely because the law makes them bad. Thus all things made legal are at the same time made legally ethical because it is law, and law must be deemed ethical, or the system itself must perish. The crime

of law against humanity is not that it makes an honest mistake, but that it should be permitted to do so beyond a practical necessity.

In conclusion, then, the divergence between the legal and popular conceptions of life requires that each sphere remain distinct; that is, a statute, merely because law is hypothetically ethical, can not make a thing bad in itself thereby good in itself—it can only make it good in the eyes of the law so far as that field of obligation goes; nor can a statute make a thing, which is good in itself, to be wrong in itself, but only wrong in the legal realm. Law has no magic to change the eternal principles of right and wrong, for they constitute the standard sought by all law, but nevertheless law must be supreme in its own realm. It dare not, therefore, cross out of its own sphere to be merciful or philanthropic without legal authority, whatever ethical sanction might approve of such a course of action. This is not a self-evident fact, but it is a corollary to the highest ethical principle of law, and that is an unbroken uniformity in application and observance. If a principle of law is bad its results will be unsatisfactory, but even a bad law, if not atrocious, should be inviolable as long as it is a law. The way to reform law is not by breaking it, but in revising and constructing better statutes. Of course, the right of open revolt against atrociously conceived legislation is one of the inherent rights of human existence.

Another important distinction between general logic and legal logic consists in the engrafting of an additional method as a necessary element into its terms and propositions. We have already seen that law will not employ in many cases the popular concept as it may find it, but fixes a definite content of its own, and now we discover that it goes even farther by adding to this content a specific against its own abuse. Thus the terms and propositions of law, to become a part of the legal fabric of a case, must come with certain credentials

of surrounding conditions and guaranties. This is a provision both salutary and unique, being unknown to general reasoning, which has no means of preventing a reckless ignorance, disregard, or trickery in the manipulation of its rules. Law, however, will tolerate no such chance of error. The complete system of courts, with a trained and sworn moderator and regularly licensed and sworn practitioners following a prescribed course of procedure, is analogous in principle to a medicinal flask, constructed to hold nothing but the proper remedy, to discharge its contents only at proper intervals, at the proper time, place, manner and quantity, thus becoming a highly constituent factor of the treatment itself.

Thus the law provides that a phase of the validity of the legal concepts and propositions is a prescribed method of application. Such a safeguard renders the law of procedure an all-important factor in legal practice. Formal logic is satisfied in the pursuit of truth to lay down the conditions under which inferences may be clearly drawn, but it serves no injunction against a too hasty conclusion, nor issues a mandamus to compel a hearing of both sides of the question. Law assumes that logic, as a practical means of reaching truth, must avoid and eliminate bias by a counter-cutting steel-cut-steel process. General reasoning is subject to all looseness of method and order in the running of the logical machinery, but law denies such liberty as destructive of guaranteed results.

The insistence of law upon irrevocable method is well illustrated in the case of the Swiss valet, Courvoisier, who murdered Lord William Russel in the year 1840. During trial, Courvoisier admitted his guilt to his advocate, Phillips. Phillips had been throwing the burden of suspicion upon a housemaid. What course should he now pursue? It happened that an eminent judge was sitting on the bench with the judge trying the case, and Phillips took this man into his

confidence and asked for advice. The judge declared that Phillips was bound to continue the defense of the prisoner, whose case with the abandonment of his counsel would be hopeless on the ground that the law held the prisoner innocent until proved guilty. The speech of Phillips was a masterpiece of eloquence. He devoted his energy to impugning the witnesses' veracity, claiming it was not his business to say who committed the murder. Hailman says, "that the conduct of Phillips has since been justified by the preponderance of professional opinion though public sentiment outside of the profession generally condemned it."

The above case splendidly shows the tendency of the conflict between the legal and popular points of view to force an issue. The advocate is frequently called upon to decide whether he will work as a wheel within the law or break with it for personal reasons. Whatever may be said in support of a lawyer refusing a cause of defense where he believes the defendant to be guilty, the same reasoning would not apply with equal force where the action has once been undertaken. In any case he is not supposed, presumed, or entitled to form any personal judgment of guilt, either from circumstances or from a confession by the defendant, for he is bound to work under oath under presumptions of the law and within the scope of the law, which, as has already been pointed out, is not directly concerned with the question of moral guilt. Dr. Samuel Johnson's opinion was to the same effect. Except under careful provisions, the law pays no attention to private confessions, for experience has shown that a crime sufficiently advertised need not go for want of a confessor. There are various reasons why a confession should be an object of suspicion and be subject to legal tests to ascertain its genuineness. For these reasons the lawyer does wrong who insists upon confusing these two distinct fields of obligation. To discover guilt, or extract a confes-

sion in order to more skilfully defend, is bad ethics in the moral field, and bad ethics in the legal field, for if convinced of the defendant's actual guilt he has psychologically rendered himself unable to defend with the neutral vigor of a man who considers that the law expects him to make the presumption of innocence something requiring substantial proof to overcome.

Furthermore, as a matter of method, general logic is not opposed to the omission of terms and even propositions in argument, presuming the mind to supply them. Legal logic, on the contrary, extends no such privileges to the litigants, court, or jury in the preliminary pleadings. It even decrees that the minor premise of the syllogism upon which the case rests must be set forth in the form of a written allegation filed in the Court. So also many additional regulations concerning the exact manner of stating this allegation are both mandatory and exacting. Moreover, while the major premise is not required to be expressly stated, yet it must be revealed by implication in the language of the minor premise so clearly as to be unmistakable. No express allegation of the major premise is necessary because through the rule of judicial notice statutes and legal principles are considered as always stated for legal purposes and the Court is compelled to recognize them without argument or declaration, unless they are not obvious from the pleadings, or are required by law to be specially pleaded. In general reasoning no law compels a written statement of the proposition, no filing as a part of a permanent record, and no submission of the written form to the opposite party. There is no necessary order in which the premises must be laid down, nor in fact any compulsion that they be formally presented at all, all this in discursory debate being largely a matter of rhetorical expediency. Thus, either premise may come first, or even the conclusion drawn and the premises developed thereafter, but in legal procedure the minor premise in the form of a declaration or

complaint constitutes the first step in every legal action and the conclusion the last.

But it must not be erroneously inferred from what has been said, that ordinary methods of reasoning in the free and easy liberty of general logic finds no place for exercise in the legal profession. Far from it, for although a strict compliance with legal logic controls the initial stage constituting the pleadings, and pervades the general course of the trial, yet when it comes to the final argument before the court or jury little restraint is placed upon the argumentative methods of the advocate so long as they do not come into conflict with the field guarded by legal logic. Thus, legal logic governs the general setting, plan and frame of the trial, while ordinary and uncritical methods of reasoning are permitted to fill out the details once the fundamental framework has been established.

In still another respect the system of law varies its logic from that of general reasoning, since not only does it prescribe its own logical categories, its own ethics, and its own test of the truth, but also its own facts for it enters elaborately into the field of evidence, selecting the data which it considers good and rejecting what it considers bad. In this respect the common-law system is much more rigid than in countries where the civil law has dominance; as in Europe and Louisiana. In some countries almost any form or species of evidence is freely admitted and the trial partakes much of the nature of an open contentious dispute under the supervision of a referee. In this country, however, we have hedged the entrance of evidence round about with many technical and subtle rules, all of which are intended to serve some useful purpose in the proper restriction of the trial within proper bounds and within the practical limits of time and expense as well as the prevention of unsound inferences from manufactured or unauthoritative data. To the popular mind the application of these bars in

some instances seems the acme of the absurd. For example, to refuse to allow a farmer to prove the value of his land by means of a comparison with the value of the land adjoining is to his mind inexplicable, or to refuse to allow him to say that he contracted with a certain man is foolish, or that his neighbor never intended to pay for his services is unfair, or that he thought he heard his wife say thus and so is very strange. Nor is it true that such rejected material has no real logical force, for in some cases it would amount to a pivotal point in the evidence. The sacrifice is in general for the sake of justice in the concrete and in the long run. General reasoning, on the other hand, welcomes any and all evidence from whatever source and in whatever form and leaves the factor of error to be eliminated, if at all, by the opposition in the process of rebuttal.

Finally, the logic of law endeavors to overcome the temptation to maliciously manufacture evidence or to evade or to remove the same by imposing the penalty of perjury upon witnesses and contempt for disobedience to the orders of the court. Thus, in fixing the content of its own terms, in charging them with elements of method, in choosing its own facts and in penalizing for false testimony, legal logic deviates from the logic of general reasoning and hence, in construing its own logic, its own ethics, its own facts and its own truth, produces as a practical system of reaching the maximum of justice the completest instrumentality that the world has ever known.

CHAPTER II.

DEDUCTIVE REASONING.

Argumentation Generally.

The practice of law is fundamentally argumentative. It deals with subjects in controversy, and its primary aim is the settlement of disputes—sometimes by persuasive methods out of court and sometimes in fiercely contested legal battles—in either instance the instrument of reason playing a dominant part.

Obviously such a profession must be carefully safeguarded as to methods and limitations if the ends of justice are to be conserved. The temptation to crooked manipulation and fraudulent trickeries of language and logic, makes it imperative that legal procedure be based upon the soundest rules of scientific logic supplemented by whatever modifications and restrictions the experience of mankind has found necessary to make the procedure practical and advantageous.

Hence the natural limitations of time and expense have placed boundaries upon too highly specialized theoretical and absolutely scientific methods of investigation of controversial data and reasoning processes, so that in the adjudication of human disputes the legal employment of logical method aims only at approximate results—at practical and efficient justice rather than refined niceties at the cost of long delays and unjustified expenditures of time and money. Nevertheless, outside of well-established regulations intended to make the system more workable, the courts endeavor to work strictly within the laws of logical science and strive to avoid all of the pitfalls of logical fallacy.

It follows that the first duty of the practitioner is to fully master the medium of litigation, the well established principles of argumentative discourse. Such a preparation calls

for a complete knowledge of the various forms in and through which reasoning finds expression, and to render their use so familiar through practice, that they shall cease to be exo-skeletons of the subject-matter, but become endo-skeletons and an indistinguishable part of the thought itself.

Although it has been popular with a certain class of pettifoggers to belittle the study of logic and public speaking in connection with the practice of law, yet history shows that more lawyers are cramped by inadequate understanding of the laws of reason than are made artificial and stilted by a too complete mastery. That a little learning is a dangerous thing is particularly true of the use of logical forms. However, very few minds ever master the principles of logic to the extent of producing the result of formality in their reasoning without also pushing farther and gaining that mastery which gives the greatest freedom, power and dexterity. No one would advocate for a moment that the rigid forms of logic should be made to protrude themselves unless their very prominence becomes itself a means of clarity to the particular argument. It is the extremely desirable power of being able to work the material of thought in and through these forms at the will of the operator, thus utilizing them as a corrective agency that should justify an exhaustive study of the technic of reasoning. For what consistency is there in the plan of mastering a wilderness of legal technicalities and then to refuse or ignore an equivalent mastery of the technicalities of reasoning, the medium by which the former distinctions are to be applied in practice? However, as in the case of every other art, it is the bungler who most resists the science of his profession.

The Necessity of a Proposition.

And first of all, the initial *sine qui non* to the process of correct reasoning and argumentation is the proposal of a

proposition. The basis of this demand rests upon the purpose of argumentation. Argumentation is a process to determine the truth or falsity of some relation. To do this successfully requires that the particular relation be set out carefully for the purpose—it must be clear, single, and alone, and the only known method of securing such a result is to embody the relation in that formula of thought and language, known as the subject-predicate combination, that is to affirm a given thing to belong to a given subject. This formulation is known as a proposition. Plain as this requirement seems to be, it is an indisputable fact that labored contentions have often vanished entirely when the ground of disagreement has been finally and formally reduced to a proposition. The tendency is to disagree upon provocation and to find no basis of disagreement upon reflection, analysis and definition.

Moreover, there can be no argument without two opposing sides, and two opposing sides presumes the existence of two minds, the one supporting a belief in the truth of the relation and the other supporting the theory of its falsity. Thus, there must be an attitude of affirmation expressed concerning the relation, and a contradictory attitude of denial of such affirmation. It is obvious that no single word or phrase can express both an idea and at the same time an attitude by some person towards such idea. There must be both of these elements, and hence nothing less than a proposition in the form of a sentence can express this dual combination. The result of a lack of these elements is, that it is impossible to argue either a word or a phrase, however important, complex, or suggestive the idea contained therein.

For argumentative purposes, therefore, legal or otherwise, we always speak of arguing a proposition, although the subject-predicate form of a proposition has taken on a number of different names, each emphasizing and bringing to the at-

tention a slightly different phase of the combination. Thus, we have the following expressions:

1. The combination is a statement when it emphasizes the orderly system manifested in its arrangement. To make a statement implies an especial care in the formulation of such expression—an exact and formal embodiment of the relation.
2. The combination is referred to as a judgment when the mental process of arriving at the conclusion expressed is the phase under consideration and which is emphasized.
3. The combination is a declaration when the personal attitude of the person affirming the same is given publicity in the vigor of the expression.
4. The combination is an assertion when the strength of the private personal conviction in relation thereto is brought to the front. Figuratively, it is sometimes used to express a mere form without conviction. But this is a popular use of the term.
5. The combination is termed an affirmation when the fact of harmony between the belief of the person and the truth of the relation is made prominent.
6. The combination becomes a negation when the fact of disagreement between the belief of the person and the truth of the relation is emphasized.
7. The combination is entitled an allegation when the relation is emphasized as a charge against some individual or individuals, and hence, is extensively employed in this connection in legal pleadings.
8. The combination is a sentence when the language structure embodying the relation is under consideration.
9. The combination is a proposition when the relation is set out for purposes of argumentative consideration and discussion.

Of course, the uses above mentioned are not necessarily mutually exclusive nor antagonistic to each other, for a proposition should always be formulated as a precise statement and must either be an affirmation or a negation while it may also at the same time be an allegation.

The proposition is particularly essential to law, since the
Legal Reasoning—2.

very earliest attempts at judicial procedure in England recognized the necessity of reducing a dispute to an issue which was defined to be a proposition affirmed on one side and denied on the other. This at once called for a high degree of care and skill in the wording of such a proposition.

The Statement of a Proposition.

Even when an issue has been reduced to a proposition, considerable accuracy is required to make sure that the statement properly trims the issue to its actual proportions, employs the best possible terms, and with the least verbiage, and sets the relation in dispute in the correct logical relation to the burden of proof. The rules of law respecting the burden of proof and of legal presumptions must also be observed in connection with legal argumentation. Preliminary to such discussion, however, let us consider the proper statement of a proposition for general argumentative purposes.

First of all, he who proposes a question is held by the custom of language and thought to be advocating something new, a change from the existing order of things, and hence, running counter to the presumption in favor of the rightness of things as they are. Thus, the innovator of new things must prove why there should be a change. The rule is, that he who antagonizes a presumption should prove his ground.

In the second place, a proposition must be either affirmative in form or negative, and hence, there is a usage which amounts, itself, to a presumption that a person always affirms what is new and what is against and counter to a prevailing presumption, so that not only he who attacks the presumption is held to prove his case, but he who affirms a proposition is likewise held to prove it, so that a proposition, as a result, should always be formulated to satisfy both of these conditions; it should run counter to a prevailing belief and should affirmatively state its ground. It produces an

awkward confusion as to who sustains the burden of proof to affirm the ground of prevailing belief and presumption or to deny the opposition to such belief and presumption. In addition to the conditions just mentioned, the proposition should be single and whenever possible absolute, although a proposition may sometimes be argued subject to a condition assumed without dispute. But when both the main proposition and the conditional proposition are controverted there results two distinct questions which should never be thus confused, but separated and disposed of independently. Furthermore, the proposition should not include words and terms which are in themselves ambiguous or uncertain, or involve dispute, or which beg the very question in controversy.

Under proper legal limitations the proposition is freed from the consideration of temporary public sentiment as a source of presumption, but must adapt itself to the presumptions recognized or established by law. In connection with pleadings whose very purpose is to bring the controversy to an issue or issues, the proposition is employed in a two-fold capacity. Thus, the plaintiff is required to allege his facts and the defendant to counter with a denial or admission of the same, thus expressing the issue both affirmatively and negatively. Such a formal statement pro and con and signed by the parties making the same and many times verified by the respective litigants, is peculiar to the procedure of law and indicates how important the courts of justice look upon a proper preliminary statement of the proposition to be tried.

The Process of Argumentation.

Argumentation is but one of four distinct discourse processes, to wit, description, narration, exposition and argumentation. The latter is the most comprehensive and inclusive, for it may use for its purposes either one or all of the other processes as filling material, that is to say, argumentation in

its widest use not only employs logical means to convince the mind, but persuasive means to induce the mind to action as well. In fact, argumentation in practice before living men and women usually broadens out into oratory and many brilliant feats of eloquence at the bar bear testimony to its efficacy. However, it is the purpose of this discussion to treat more particularly the strictly logical side. Yet, even when limited to the field of reason alone, the process of argumentation covers a considerably wider field than does that of formal logic. The traditional logic of Aristotle was confined principally to a discussion of Deduction. Argumentation, however, covers a field involving also Induction, Tradition, Analogy, Authority, Example, Cause and Effect, Alternatives, Elimination, A Fortiori, Congruity and various other distinctive types of appeal.

Now the great obstacle to clearness and simplicity in the understanding and use of these various forms of inference arises from the fact that these several species of argument are not mutually exclusive, but springing from different points from which to view a logical relation may assume various relations to each other, that is, the one form may furnish a general plan of inference and another become a subsidiary part of such plan. Or two or more of them may constitute correlative stages or condition each other. Thus they combine sometimes in very complex if not bizarre fashion, and hence challenge the most analytical mind to prevent them from the concealment of fallacy. It is needless to plead that no such compounding should be indulged in, for the simple reason that the mind will produce these complications without any knowledge whatsoever of the separate character of these forms nor of the many pitfalls which beset them. Every strong and resourceful mind will unconsciously employ a number of distinct reasoning forms, but will not at the same time and with the same intuition, employ them correctly, so that a scientific knowledge of their

character and method of manifolding is an invaluable aid to accuracy.

Argumentation may be defined as the process of adducing evidence in support or contravention of a given proposition. Such evidence begets inferences, and these inferences must be organized and directed to the point of application by the use of the several forms of reasoning already mentioned. Such forms are, therefore, means to the end of marshaling inferences, so that a large part of the benefits of mastering their make-up is to acquire the science and art of dovetailing them together, and when necessary to draw them apart in order that possible errors may be disclosed.

Now the results sought by the process of argumentation are either to prove the truth or falsity of a given proposition, or with less absoluteness to induce the mind to believe at least in its truth or falsity, or still less, merely to accept the same on general principles. The first degree of impression constitutes the effect of absolute certainty, the second moral certainty, while the third amounts to some degree of probability only. Thus, evidence produces different degrees of mental constraint to adopt its proposed ends all the way from a slight inclination to mental compulsion. The term proof has often been used to designate evidence, but in its proper and correct significance it means that effect upon the mind produced by evidence and designated as certainty. Proof, therefore, is not often possible outside of the realm of pure mathematics, while evidence is easily adduced, for it is anything which tends towards the production of proof. Evidence is a means to the production of proof as an end. But in this definition the term evidence seems to include only mental elements or motives, while as a matter of fact, in actual life, emotional elements are also often intermingled in the process, so that evidence is more often a composite of both intellectual and emotional factors.

The Forms of Argument.

The forms of argument are, therefore, methods of adducing evidence, and are valuable not only in giving system and order to the compilation process, but also because they become a means of discovery and disclosure of evidence otherwise overlooked. In addition to this, some of these forms when effectively used are, in themselves, evidentiary, since the very machinery of a piece of reasoning may be so obviously correct that its results are thereby highly magnified.

However, the opening of a detailed discussion of the various specific forms of reasoning calls for a preliminary grouping of them around general principles. Thus, Deduction, Induction, Traduction and Elimination are expressions of the fundamental movement of the mind when drawing inferences from the process of putting within or excluding matters of thought from a given and bounded field; Analogy and Example are based upon inference from the principle of identity; A Priori reasoning, A Posteriori, Antecedent Probability and Sign are forms derived from the relation of cause and effect; Authority is founded upon the power of knowledge; Incongruity is based upon the rule of harmony in nature; while various other species are dependent upon a direct test and appeal to the senses and intuition.

GROUP 1.

Argument by Deduction.

As already mentioned, deduction is a process of inference from one thing to another by the use of the principle of inclusion and exclusion. Part and whole is a relation of this nature. Whatever is true of each of the parts or divisions of the whole must be true also of any part or division considered alone. It is usual for the mind to picture this relation in space, and Aristotle seized upon the device of circles

to illustrate the relation of whole and part—the mind easily grasping the idea of the inner and outer and overlapping areas together with the inferences made perceptibly visible. But the concrete picture area illustration must not be allowed to exclude the principle of inclusion and exclusion when applied not to space areas but for example to time units, or to numerical units of objects, or still further to abstract conceptions. Space may be bounded, duration may be bounded, sound may be bounded, number may be bounded, sensation impressions may be bounded, ideas may be bounded, and in fact whatever can be bounded and reduced to the relation of whole and part may be reasoned under the form of inference known as deduction.

Deduction has thus been defined to be a movement of the mind from an object as a whole, to some part therein. From this it has also been described as a movement from a general to a particular. Both of these observations are true when properly understood, but are misleading when taken too carelessly. Thus, from whole to part here means, from all of the parts of the whole to any part of the whole, the term “whole”, standing for a plurality which makes up the whole and not a single thing. It might, therefore, be more truly said to be an inference from all to any one included within the all. And still this formula is not sufficiently self-explanatory. The term “all” may either be a class comprised of discreet separate individuals, and these individuals in turn be either single or a class of lesser individuals of some other type, or the term may be used of a single individual theoretically presumed to be made up of a number of individual parts. Moreover, the term “all”, as here employed, having a numerative and not a collective meaning, may be said to be general as opposed to any parts of which it is composed, while the term “particular”, referring merely to a relation which it bears to the general, within itself, may be also a subclass of objects or divisions, so that deduction finally may be

said, to be an inference from "all to a less general unit of the all". These distinctions may be illustrated as follows:

1. Principle of "Inclusion and Exclusion" illustrated by area boundaries.

Fig. A.



Fig. B.

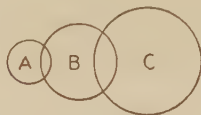
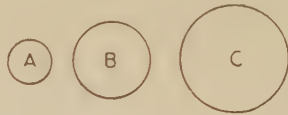


Fig. C.



2. In which the "All" refers to a group plurality and the "Particular" to one individual.

Thus: a. (All judges) are sworn officers.

b. (John Smith) is a judge.

c. (John Smith) is a sworn officer.

3. In which the "All" refers to a group plurality of collective units and the "Particular" to a collective individual.

Thus: a. (All supreme courts) have appellate jurisdiction.

b. (The Massachusetts Supreme Court) is a supreme court.

c. (The Massachusetts Supreme Court) has appellate jurisdiction.

4. In which the "All" refers to an area with imaginary parts and the "Particular" to one of these parts.

Thus: a. (All of the court room) is poorly ventilated.

b. (About the judge's desk) is a part of the court room.

c. (About the judge's desk) is poorly ventilated.

5. In which the "All" refers to a class of collective units and the "Particular" is composed of a group of these units.

Thus: a. (All supreme courts) have appellate jurisdiction.

b. (The Massachusetts, Kentucky and Indiana Supreme Courts) are supreme courts.

c. (The Massachusetts, Kentucky and Indiana Supreme Courts) have appellate jurisdiction.

6. In which the "All" refers to a wholly theoretical plurality of particles and the "Particular" to a portion of such plurality.

Thus: a. (All cement) is soluble.

b. (All wax) is cement.

c. (All wax) is soluble.

7. In which the "All" refers to a psychological state and the "Particular" to another state.

Thus: a. (All sentiment) is ephemeral.

b. (Graciousness) is sentiment.

c. (Graciousness) is ephemeral.

The Use of Terms.

As already pointed out, the process of deduction, considered as a whole, is the drawing of an inference from "all" to a "part", but the "part" must first be related to the "all", and this requires two preliminary steps before the final conclusion can be drawn. We are familiar with the axiom or law of thought, that two things which are equal to the same thing are equal to each other. The three steps above mentioned: two preliminary and one following are built upon a use of this principle—thus two things whose relation together is unknown may be made to disclose that relation if they can both be related to some known and same third thing.

For example, if we know the relation of A to X, and B to X, we can discover the relation of A to B. Here, then, are the two preliminary relations—A to X and B to X—and, thereupon, the conclusion follows of the relation of A to B. Obviously, therefore, in making this inference we will have three things to be related, three relations resulting, and three propositions necessary to express the three relations. The total arrangement of these things, relations, and propositions in order to show how the inference is thereby developed, is called a syllogism.

Now the language structure, whether it be composed of a single word, or words, a phrase, clause, or whole paragraph, in short, whatever taken together is necessary to express the

complete idea of the thing related, when used in a syllogism, is called a "term". Since each proposition must relate two of these objects of thought, it therefore contains two terms, so that each syllogism must contain at least six terms, to wit:

- Thus 1. (*Whatever is hard to believe*)
is not 2. (*necessarily illegal*).
3. (*That a justice of the peace can decide a question of constitutionality*) is 4. (*hard to believe*).
Therefore 5. (*That a justice of the peace can decide a question of constitutionality*) is not 6. (*necessarily illegal*).

It will be plain to observe from the diagram above that each of these terms appears twice and that one disappears in the conclusion. Such disappearing term is, evidently, merely used to bring the other two terms into relation, and, hence, is called in logic, the Middle Term. The remaining two terms, it is also clearly seen, must be combined in the conclusion, for this was the purpose of the whole process: to discover the relation of these two terms. Since, however, each of these appears once in the conclusion they can, therefore, appear only once each in the first two propositions. Now the last term of the conclusion, being a predicate, must express the "all" to be related, for a predicate in thought is normally wider than the subject, and hence, this term expressing the "all", or whole, as often named, is called in logic, the Major Term, because it represents the wider bounded of the two things being alleged. In contrast to this, the term, which becomes the subject of the conclusion, must be "the part", or "particular thing" which is related to the "all", and consequently this term is called

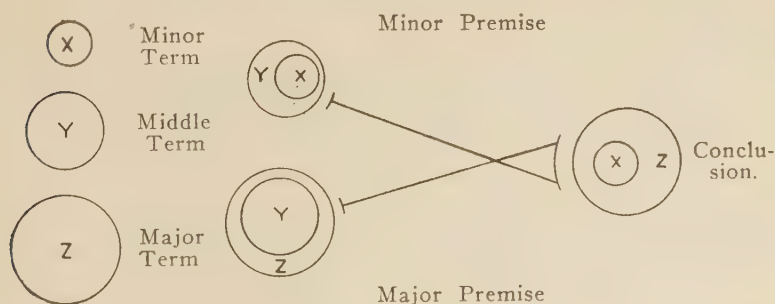
the Minor Term. In the order of their extent of boundary, therefore, on an ascending scale they would be respectively Minor Term, Middle Term, and Major Term. Should these be arranged in the form of a proposition, we would have something as follows:

- Proposition 1. Containing the largest term—(Middle Term) is (Major Term).
 Proposition 2. Containing the lesser term—(Minor Term) is (Middle Term).
 Proposition 3. Containing the lesser and largest term —(Minor Term) is (Major Term).

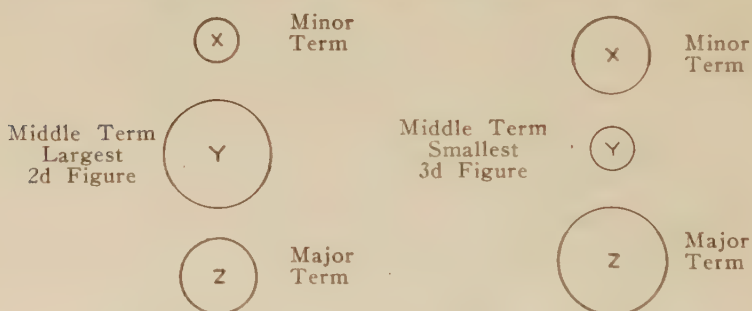
The form above is known as a syllogism. The first proposition, because it contains the larger bounded term, is named the Major Premise, or literally the larger principle laid down; the second, because it contains the smaller bounded, is named the Minor Premise, or the lesser statement laid down; while the third proposition, because it now joins the minor and major terms for the first time, is named the Conclusion.

Figures and Moods of the Syllogism.

If the form already illustrated be carefully examined, it will be observed that the Middle Term appears as the subject of the Major Premise, and the predicate of the Minor Premise, and that it occupies a midway position between the Minor and Major Terms in the extent of bounding its object. Thus the following three circles will illustrate:



Such an arrangement produces the most conclusive argument known to deductive logic, and is designated as the First Figure of the syllogism. But this is not the only arrangement possible, and by a shifting of these "terms" from subject to predicate positions, and vice versa, three other arrangements may be formed, described specifically as the Second, Third and Fourth Figures of the syllogism. The second and third are susceptible to numerous errors, while the last is seldom used and is practically worthless. Thus, besides the Middle Term being between the other Terms in extent, it may be either larger than both or smaller than both:



By observing the rule of keeping the predicate larger than the subject we will have to shift terms as follows:

Proposition 1.	Major Term	:	Middle Term	} Second Figure
Proposition 2.	Minor Term	:	Middle Term	
Proposition 3.	Minor Term	:	Major Term	

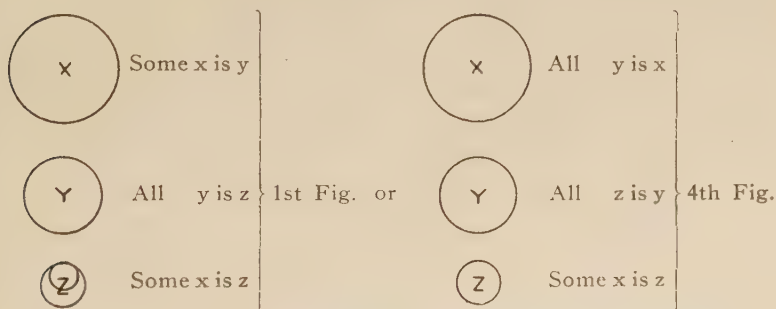
Again:

Proposition 1.	Middle Term	:	Major Term	} Third Figure
Proposition 2.	Middle Term	:	Minor Term	
Proposition 3.	Minor Term	:	Major Term	

Again:

Proposition 1.	Major Term	:	Middle Term	} Fourth Figure
Proposition 2.	Middle Term	:	Minor Term	
Proposition 3.	Minor Term	:	Major Term	

The variation above noted appears to affect the Middle Term as follows: In the First Figure the Middle Term is the subject of the Major Premise and predicate of the Minor Premise, in the Second Figure it is the predicate of both premises, in the Third Figure it is the subject of both, and in the last Figure it is the predicate of the Major Premise and subject of the Minor Premise. It may sometimes happen, also, that the rule of keeping the subject narrower than the predicate is fulfilled, not by requiring the minor object to be smaller than the major object, but by using but a portion of the minor object, as for instance where the minor object may be the largest.



As a result of all these variations of terms, we may rely upon one fact in endeavoring to test a deductive argument, where the premises are not clear, and that is this: the subject of the conclusion proved by the premises is the Minor Term, and the predicate is the Major Term. This is true of all four figures of the syllogism and hence by remembering the places of the Middle Term in the premises of each figure, they can easily be constructed and the results tested.

However, propositions may be either universal or particular, and also affirmative or negative, so that each Figure in turn may be further reduced to variations by the many ways in which these different forms may be combined. Such variations of the elements of universal and particular, affirmative

and negative, are called "Moods" of the syllogism. Each Figure is capable of a number of these, to wit, a total of sixty-four, out of which there are fifty-three which contain error and but eleven valid ones. Nevertheless, these valid ones are not even equally valid in all four Figures. Allowing the order 1, 2, 3, of the three capital letters employed, one to represent the Major Premise, the second the Minor Premise, and the third the conclusions we may symbolically compose any of these "Moods."

Let A = a universal affirmative proposition.

Let E = a universal negative proposition.

Let I = a particular affirmative proposition.

Let O = a particular negative proposition.

The following are the valid moods of the syllogisms:

Fig. 1.	A A A	Fig. 2.	E A E	Fig. 3.	A A I	Fig. 4.	A A I
	A A E		A E E		I A I		A E E
	E A E		E I O		A I I		I A I
	E I O		(E A O)		E A O		E A O
	(A A I)		(A E O)		O A O		E I O
	(E A O)				E I O		(A E O)

Rules of the Syllogism and Their Service.

While but twenty-four valid combinations of the syllogism exist out of a theoretically possible two hundred and fifty-six of such combinations, yet a very large number of these are so manifestly erroneous that they give but little trouble, nevertheless a considerable number of them conceal such subtle errors in reasoning, that they will often deceive the most alert mind. For this reason a number of rules have been collected which render great assistance in quickly enabling a false combination to be detected. These rules and the reasons for them are as follows:

1. Every correct syllogism must have three and only three terms.

This is essential because the two terms appearing in the Conclusion to be reached, must by this form of reasoning be related and identified or not identified

with but one, single, third term. More than three terms indicates that they are related to different and not to the same term and hence, no conclusion can correctly follow.

- (a) Errors from a violation of this rule are called the Fallacy of Four Terms and sometimes arise from there being two distinct terms for the Middle Term, or one Middle Term, but ambiguous in meaning and used in two different senses, thus in reality constituting four terms.
2. Every correct syllogism must contain three and only three propositions.
Three terms to be related can at most result in only three relations to be set out in propositions so that a fourth proposition will either entail the use of a fourth term or be a repetition of a previous proposition.
(a) The error resulting from a violation of this rule is that of the Fallacy of Four Terms.
3. The Middle Term must be used twice, with exactly the same meaning and must be used at least once as applied over its whole content.

If the Middle Term should appear in but one proposition it would mean that the Middle Term is related to but one of the other terms, whereas, it is serviceable as a Middle Term because it is related to both of the remaining terms. This will require that it be used once in each premise.

- (a) The error in not appearing twice would result in some fourth term being used to fill out the required six places and again the Fallacy of Four Terms would result.

The Middle Term, further, must not be used in two senses for this would amount, in fact, to two terms, although masquerading under the same words.

- (b) The error would obviously be again that of the Fallacy of Four Terms.

The Middle Term must be covered in application or distributed to use the logical phrase in at least one of the premises, for if the whole area is not swept by the predicate at least once, it may result that the part areas covered, while both entirely within the object, are yet not identified parts, but existing merely side by side.

- (c) The error resulting from this defect is to produce out of one supposed Middle Term, in

reality, two distinct Middle Terms, with no identity whatever between them and hence once more a Fallacy of Four Terms.

4. No term can be distributed in the Conclusion which was not distributed in the premises.

It is obvious that nothing can be claimed as proved by the premises which does not exist in those premises. The Conclusion expresses only what it finds in the premises. Now it follows that if merely a part of either Minor Term or Major Term be used in the premises, it would not follow to claim in the Conclusion a complete use of such terms, so that if a term is not distributed, which means to use it over its full extent, and a partial use only is made in the premises, the same term must not be used in a wider distributed sense in the Conclusion.

- (a) The error consists in claiming to have drawn a phase of the relation expressed in the conclusion out of the premises when, in fact, it does not exist there, and when such an unwarranted claim is made of the Minor Term, it is called an Illicit Minor, and when of the Major Term, an Illicit Major.

5. From two negative premises no conclusion can be drawn. Since the two premises are expected to connect the Major and Minor Terms by relating them to the same third term, it is plain that if both premises assert no relation to such term, there is no point of unity at all and no added information to be gained whatever—they simply may or may not be related.

- (a) The error is in supposing that two things which do not become a part of the same third thing do not, therefore, become a part of each other. No conclusion can be drawn either affirmative of or negative concerning the existence of identity.

6. If one of the premises be negative and one affirmative the Conclusion must be negative.

When we know that the effect of an affirmative premise is to wholly or partially identify either the Minor or Major Terms with the Middle Term, and the effect of the negative premise is to separate the remaining Term from such Middle Term, the one placing in and the other placing out one of the two Terms to be related, it is obvious that the relation in the Conclu-

sion must signify a lack of identity at least in part.

(a) The error resulting from a violation of this rule is to overlook the fact that the affirmation of an identity coupled with a negation only serves to strengthen the negation.

7. From two particular premises no Conclusion can be drawn.

This rule needs careful consideration to become clear. Let the attention rest upon the fact that a particular premise always treats of but a part of the subject of the premise and that in the First Figure of the syllogism one of these subjects must be the Middle Term and the other use of the Middle Term is that of a predicate. This being so, neither use of the Middle Term is distributed and hence no identity in connection is necessarily predicated. The identity may exist, but is not discernible from the premises, hence no such inference can be drawn. In the Second Figure both uses of the Middle Term occur in the predicate and since no predicate is ever distributed in an affirmative premise, therefore, if both premises are particular and affirmative, there can be no distribution of the Middle Term and hence no Conclusion certain, or, if one premise be negative, then no affirmative Conclusion is possible for reasons given under rule six, nor is a negative Conclusion possible, for a negative premise always distributes the predicate so that as a result a negative Conclusion would distribute the Middle Term which is not distributed in the premises. In the Third Figure the Middle Term is used as the subject of both premises, but since both of them are particular, neither one is distributed and no guarantee of identity ensues. The Fourth Figure is inconsequential.

(a) The error under the First Figure is that of an Undistributed Middle Term.

(b) The error under the Second Figure is either an Undistributed Middle Term or an Illicit Major.

(c) The error under the Third Figure is that of an Undistributed Middle Term.

8. If one of the premises is particular the Conclusion must be particular.

This is also a rule that calls for close inspection. When both premises are affirmative in the First Figure, if the Minor Premise be particular, the Minor

Term will be undistributed and hence can not be distributed in the Conclusion without producing an Illicit Minor, or, if the Major Premise be the particular proposition, then the Middle Term will be the particular, and hence, undistributed, but since the Middle Term is also the predicate of an affirmative proposition which is always undistributed, therefore, the result will be an Undistributed Middle. If one premise be negative and it be the Major Premise, and the Minor Premise be particular, it is plain that the subject of the Conclusion must not be universal since it is identical with the subject of the Minor Premise which is particular without an error of Illicit Minor, or if the Minor Premise be negative while the Major Premise is both affirmative and particular, then we know that a negative Conclusion, which is the only kind that can be drawn, will necessarily distribute the Major Term in the predicate, but since this term was not distributed in the Major Premise, it can not be distributed in the Conclusion without committing the error of Illicit Major. Thus, a negative Conclusion can not be drawn.

- (a) The errors possible in violating this rule in the First Figure will thus be, when both premises are affirmative, either an Illicit Minor or Undistributed Middle Term; when one of the premises is negative the error will be either that of an Undistributed Middle or an Illicit Major. Again, when both premises are affirmative in the Second Figure, and the Minor Premise is particular, the Conclusion must be particular, for the Minor Term undistributed in the particular premise can not be distributed in the Conclusion or an Illicit Minor will result. So also, if the Major Premise be particular, neither premise will distribute the Middle Term and hence no Conclusion is possible. If, on the other hand, the Minor Premise be both particular and negative, an Illicit Minor will result from a universal Conclusion, or, if the Major Premise be negative, the same result will obtain, but if the Major Premise be particular and either premise is negative, a universal Conclusion can not be drawn without distributing the Major Term which is particular in the premise.

- (b) The errors possible in violating this rule in the Second Figure will thus be, when both premises are affirmative, either an Illicit Minor or Undistributed Middle, or both, or when one of the premises is negative the error will be either that of an Undistributed or Illicit Major.

Once more in the Third Figure when both premises are affirmative and the Minor Premise particular, the Conclusion must be particular, for its subject, the Minor Term, is not distributed because it is the predicate of an affirmative premise. To distribute the same in the Conclusion would constitute an Illicit Minor. The same results would follow if the Major Premise were the particular proposition. Again, if one of the premises be negative and it be the Minor Premise, no Conclusion can be drawn, for a negative Conclusion would distribute the Major Term which is not distributed in the premise, or, if it be the Major Term which is negative, then the Minor Term can not be distributed in the Conclusion, for it is undistributed in the predicate of the Minor Premise.

- (c) The errors possible in violating this rule in the Third Figure, when both premises are affirmative, will be an Illicit Minor, or when one premise is negative, that of an Illicit Major or Illicit Minor.

Fallacies in Deductive Reasoning.

The rules of the syllogism are valuable to the reasoner in providing a practical test for determining the correctness of the syllogism. But the rules do not explain why they must be obeyed. We have pointed out in connection with the statement of these rules certain fallacies against which they are directed. These fallacies are but few in number and relate to the wrong use of Terms:

Thus each of the three Terms necessary to an act of Deductive reasoning must be used twice. Let us repeat, that each must be used twice, and both times alike. Two uses of the Minor Term must be made, and there must be no wider use, or different meaning, or any variation

in the exact duplication else the error of an Illicit Minor will result. The same is true of the Major Term, with the fallacy of Illicit Major following, and equally true of the Middle Term with the divergent effect and error of Four Terms or an Undistributed Middle. A proper identification of the Terms used is, therefore, the only basis of correct Deductive reasoning. Whether this lack of identical duplication in use results from ignorance, or the meaning of words, or inadvertent mistake of words, or accent, or language structure, makes no difference in the illogical effects,—there has crept into the reasoning a fourth idea which is spurious and alien to the connected chain of reasoning, severing the continuity of inference and completely destroying its validity.

Formal Logic has classified these fallacies as either purely formal or as to matter of content,—the result is, however, always the same—an illogical and false Conclusion. A close inspection shows, that these severally named fallacies are, in fact, but different expressions of the mistakes of improper duplication of terms, or a lack somewhere of proper identification. Upon inspection they all resolve into cases of:

1. Partial Identity { Illicit Minor Term.
 { Illicit Major Term.
 2. No Identity { Double Negation.
 { Four Terms { Illicit Minor Term.
 { Illicit Major Term.
 { Undistributed Middle Term.
 { Ambiguous Middle Term.
 { Two Distinct Middle Terms.
- A. Thus, the fallacy of Equivocation consists in the same Term in form, being used in two distinct senses, hence no identity and consequently four Terms resulting, and as a result either an Illicit Minor, Illicit Major, or

Illicit Middle, known as an Ambiguous Middle, depending upon which term is misused.

- B. The fallacy of Amphibology consists in a faulty construction of language in the arrangement of words, phrases or clauses, by which an equivocation may result in meaning, hence no identity, hence four Terms, and hence, the same results as in the case above. Fallacies A. and B. are alike in principle, the only difference being that in the former the Term consists of but one word, while in the latter of a group of words of any degree of structural complexity. The latter is much the harder to detect and often assumes the greatest subtlety.
- C. The fallacy of Composition consists in using a Term, plural in form, one time in a divisible sense and again in a collective sense, hence producing no identity, hence resulting in four Terms, and hence constituting an Illicit Minor, Illicit Major, or an Ambiguous Middle Term according to the term misused.
- D. The fallacy of Division consists in using the Term in the same manner as above, but of drawing a Conclusion based upon the divisible use rather than upon the composite use as in the error above. The errors resulting are the same as in fallacy C.
- E. The fallacy of Accent consists in a Term being used in two senses, caused by a shifting of emphasis to different parts of the Term. The result, as usual, is that of an Illicit Minor, Illicit Major, or Ambiguous Middle Term under the error of Four Terms. Here, again, considerable caution is necessary for a shade of accent is sufficient to so subtly but effectually change a Term that no actual identity exists.
- F. The fallacy of Idiom, Figure of Speech, or Slang, consists in the use of a Term in two senses, the one literal and the other by virtue of usage having a bizarre significance, the result being that no identity results, there is produced four Terms, and hence an Illicit Minor, Illicit Major, or Ambiguous Middle Term.
- G. The fallacy of Accident consists in the use of the Term in two senses, the one use referring to the more general and permanent attributes of an object, and the other emphasizing some accidental, temporary, or unusual attribute of the same. There are two forms of this error, when what is alleged merely of general attributes is applied wrongly to some accidental condition, and

inversely, when what is alleged of an accidental condition is applied to the object under all or more general conditions. Again the result is an error of four Terms, either an Illicit Minor, Illicit Major, or an Ambiguous Middle Term.

- H. The fallacy of *Petitio Principii*, or *Circulus Probandi*, as sometimes called, or Argument in a Circle as popularly known, consists in including in one of the premises the exact inference to be drawn in the Conclusion. This error amounts to assuming what is to be proved as evidence of itself and, of course, any proposition may apparently be proved by such an ingenious method. At bottom, the fallacy involves the omission to use one of the Terms twice, particularly that of the Middle Term. This error is often committed and is extremely dangerous, because of the subtle forms under which it may lurk. The fallacy may even exist under the implication of a single word, but commonly arises under the guise of a different phraseology or complexity of statements.
- I. The fallacy of *Irrelevant Conclusion*, or *Ignorantio Elenchi*, consists in drawing a Conclusion, not in accord with the statements in the premises. It is not a mistake in the use of the premises, but an inference made merely upon an apparent suggestion from the premises. It is deceptive, because it appears to follow the logical formula, whereas, in fact, this is only a blind under cover of which a wholly erratic and irrelevant claim may be made. When adroitly and swiftly made the imposition is often difficult of detection.
- J. The fallacy of *Negative Premises* consists in the total lack of identity as expressed in both premises, hence no relation established between the Major and Minor Terms, and hence no Conclusion possible, either affirmative or negative.
- K. The fallacy of *Particular Premises* consists in a misuse of Terms somewhere in the syllogism, varying as to the form of misuse according to the Figure and Mood of the syllogism in which it occurs. The numerous variations of this fallacy have already been outlined under the topic of the Rules of the Syllogism. When two particular premises are used there is bound to result a lack either of total or partial identity with the consequent errors connected therewith.
- L. The fallacy of *Undistributed Middle* is not to be con-

fused with that of Ambiguous Middle, yet constitutes a total lack of Identity, not under the use of four distinct Terms, but under the use of two distinct parts of the same Term rendering the fallacy one of Four Terms. Thus, the Middle Term must be distributed or used as a whole, and used at least once in order to insure that the same parts of the same Term are identified.

- M. Most of the fallacies above referred to are also explained and illustrated by decided cases.¹ Certain other fallacies will be mentioned in connection with the conditions associated with them under the following headings:

Dangerous Variations of Form.

Language, being the medium in which and through which logical inferences are drawn and expressed, calls for a critical watchfulness at times to prevent it from obscuring logical fallacies. For example, a proposition may express the same idea either negatively or affirmatively, or through a double negative an affirmative may emerge; again, a proposition may involve a number of corollary propositions equally as true but not nearly so obvious, so determined is the mind to follow a habitual groove of attention; or again, a whole syllogism may be bound up in one statement, or a series of syllogisms contracted into one complex sentence. In such cases, the implied links and the part they play are often overlooked, and when supplied, either vindicate or repudiate the combination; still further, one term may be expanded into a conditional sentence, or alternative added, in which case the expanded form needs careful attention to prevent obscurity.

¹ Elliott's Work of the Advocate, 443-496. See also "General Practice."

These Classes are:

Class 1. Equivalent Inferences:

Affirmative: All metals are elements is equivalent to Negative: No metals are compounds.
 Affirmative: All peoples are perfect is equivalent to Negative: No peoples are imperfect.
 Affirmative: Some men are honest is equivalent to Negative: Some men are not dishonest.

Class 2. Corollary Inferences but not Equivalent:

- a. Conversion by Limitation.
 All houses are structures implies that some structures are houses.
- b. Simple Conversion.
 Some metals are brittle substances implies that some brittle substances are metals.
 No animals are plants implies that no plants are animals.
 But it is not true, however apparent it may seem, that if all animals are plants, then all plants are animals—a fallacy easily committed.
- c. Negative Conversion.
 Some men are not moral implies that some not moral persons are men.
 A fallacy often occurs in assuming that the Term, not moral, is identical with a positive class, such as immoral, which does not always follow.
- d. Contrapositive Conversion.
 All artists are benefactors implies that all not benefactors are not artists.
 But a fallacy lurks in the supposition that the latter proposition conversely implies the former, neither does the first proposition imply that all not artists are not benefactors.
- e. Limiting the Subject and Predicate.
 All metals are elements implies that all very heavy metals are very heavy elements.
 Connected with such addition, however, there often arises fallacies of the most subtle and elusive nature. The adjective or added idea, while being one and the same before attached to the subject and predicate, may suffer a

change in significance from the idea to which it is added. No such change is observable in the instance above, but in the following the change is marked.

Thus, "All kings are men" is not a corollary to "All incompetent kings are incompetent men."

With comparative terms the inference is seldom true. Thus, we can not infer from, A cottage is a building, that, A large cottage is a large building.

f. Expanding the Subject and Predicate.

All metals are elements implies that, A mixture of metals is a mixture of elements, or, A horse is a quadruped implies that, The skeleton of a horse is the skeleton of a quadruped.

But here again a fallacy will occur if the part in its relation to the larger conception is not the same in both subject and predicate. Thus, the statement, That citizens are men would not imply that, A majority of citizens are a majority of men.

Class 3. Abbreviations of Expression:

Arguments which are made in conversation, in books, and even in argumentative speaking are seldom expressed in the full logical formula of the syllogism, but are condensed by customary abbreviation into the ordinary idiomatic current of language. This is not because thought and logical reasoning, themselves, have any short cuts, but because the economic tendency to save effort causes much to be expressed by inflection, emphasis and gesture. In general, when one of the conjunctions: therefore, because, since, for, hence, inasmuch, as, consequently, or many other words occur, it is certain that an inference has been made, and that some form of reasoning has been involved—not infrequently, that of a complete syllogistic process.

It is extremely important, therefore, that the power

and use of abbreviated language in this process be fully understood, for any refutation must disclose the hidden formula from which the conclusion has been drawn. The full syllogism may be abbreviated into any two of its three propositions, or, in rare instances, into a single statement:

a. From Two Propositions.

All men convicted of a felony are not citizens.	}	Conclusion unexpressed.
And John Brown is convicted of a felony.		

John Brown is not a citizen because	}	Major Premise unexpressed.
He has been convicted of a felony.		

John Brown is not a citizen because	}	Minor Premise unexpressed.
All men convicted of a felony are not citizens.		

b. From One Proposition.

Men who have no rights can not justly complain of any wrong.	}	Minor Premise and Conclusion unexpressed.

Why should Brown, who has no rights, complain?	}	Major Premise and Conclusion unexpressed.

Everything considered, Brown can not complain.	}	Major and Minor Premises unexpressed.

c. From a Loose Combination of Clauses.

"I need not draw the conclusion for you. To see the object was to have the desire; to have the desire was to possess a motive; to

possess a motive was to take the object; to take the object was to commit the crime." Here there are a series of syllogisms compacted together by the omission of a re-statement of some of the Premises and Conclusions.

Class 4. Conditional Syncopation and Expansion:

a. The Hypothetical Condition.

Sometimes where a relation between two objects exists or ceases to exist upon the presence or absence of some circumstance in connection therewith, the conditional circumstance may be made a part of the Middle Term, thus:

Judge Whitaker, upon the bench, is an official character.

But Judge Whitaker is upon the bench.

Therefore Judge Whitaker is an official character.

Again:

Judge Whitaker, when the court room is crowded, is a pompous person.

But the court room is crowded.

Therefore Judge Whitaker is a pompous person.

In these cases a part of the Middle Term in each instance is omitted, as for example, "But Judge Whitaker is upon the bench" would be, without abbreviation, Judge Whitaker is (Judge Whitaker upon the bench). So also under the second illustration, the statement, "But the court room is crowded," if given in its full language form, would be the seemingly absurd statement, "But Judge Whitaker is (Judge Whitaker when the court room is crowded)." The justification for omission in such cases is plainly obvious. The full expression in many instances would prove a more formidable obscuration of the meaning than a too extensive abbreviation would be to invite inaccuracy. However, these conditionally modified Terms are usually expanded into a full conditional clause, that is, "Judge Whitaker upon the bench" would, in

current language, be expressed as "If Judge Whitaker is upon the bench, he is an official character." This complex statement, while posing as a Major Premise only, is in fact a combination of both Major Premise and Conclusion, and often suffices for the whole syllogism, the Minor Premise, "But Judge Whitaker is or is not upon the bench" being unexpressed.

Now this conditional form of the syllogism is beset by a very plausible double fallacy known as Denying the Antecedent, or of Affirming the Consequent. The former consists in affirming that the main part of the complex statement is not true, because the conditional subordinate part is not true—this is a fallacious inference because the condition expressed does not necessarily exhaust all of the conditions upon which the main clause is true. To infer, likewise, that the conditional part of the proposition is true because the main clause is true, involves precisely the same fallacy. The conditional clause is called the Antecedent, and the main clause the Consequent in these complex propositions.

b. The Alternative Condition.

Sometimes an exclusive alternative condition may be made the middle ground of uniting two objects, thus:

If Judge Whitaker is just he is not unjust.
But Judge Whitaker is just.
Therefore he is not unjust.

Again:

If Judge Whitaker is just he is not unjust.
But Judge Whitaker is not just.
Therefore he is unjust.

Since the syllogistic form does not clearly express the alternative nature involved in the material, just and unjust, therefore the more striking abbreviated form is used, to wit:

Judge Whitaker is either just or unjust.
But Judge Whitaker is just, or vice versa.
Therefore he is not unjust, or vice versa.

A little scrutiny will reveal that the alternative exclusive nature of the materials used

in this form of reasoning will prevent the fallacies noted under hypothetical conditions from being possible here.

Legal Applications of Deductive Reasoning.

There is abundant evidence that Deductive reasoning is used more extensively and continuously in the practice of law than in other professions, and that it is used more than any other form of reasoning. It seems to be the most convincing general form under which the mind can reason, and even when other species of argument are invoked they are many times made but a sub-process to the more generic fold of a syllogistic movement.

Although Deduction, in the informal garb of current spontaneous abbreviated English, plays a large role in every argument before the court or jury, still it fills a more conspicuous function in its relation to the system of Pleadings. It is in this connection that consideration will make plain, that the relation of logic to law most clearly reveals itself in the effort to harmonize statutory law with mental law. Logic is an old term with some undeserved mustiness about it, which designates the field of natural law traversed by the mind in reasoning. However, it is usually limited to the area of Deductive reasoning, or the domain of the syllogism, and we shall for the chapter limit our discussion to this form.

Relation of the Syllogism to the Pleadings.

That the rules of correct reasoning are essential to the proper application of legal principles to facts needs little argument. Lord Mansfield declared, "That the rules of pleading are founded in the soundest and closest logic." Since the mind is the intervening medium, from whose formula there can be no deliverance, which must inter-

pret the larger plan of natural right and justice on the one hand and construct, interpret, and apply the scheme of human statutory law to these concepts, on the other, therefore, the principles of reasoning form the unifying clearing table for jurisprudence, ignorance of which must inevitably bring results imperfect, if not fraught with evil and distress. So impressed was the great jurist, Lord Coke, with this fact, as to proclaim, "That out of good pleading the law speaketh." And more recently, Bliss, in his authoritative work on Code Pleading, gives several pages to a discussion of the importance of the syllogism in relation to Pleading, in which he says, "Every statement of fact constituting a cause of action or a defense, is but part of a logical formula." When we refer the question to the common law of England, we find no less an authority than Gould in his work on Common Law Pleading, saying, "All good pleading is in substance a syllogistic process, and that not only every declaration, but all good special pleadings on either side and at every stage are essentially syllogistic."

To illustrate how true the above statements are, and before entering into a detailed analysis of the question, let us exemplify how in succession the issues raised in legal controversy necessarily arrange themselves into the framework of a deductive syllogism:

Thus, suppose, in an action for trespass upon real property, the plaintiff declares, if at common law, or complains, if by code. Having looked up the general rules of law governing trespass, we find the statute or common-law rule in substance about as follows:

Complaint.

1. Major Premise: Anyone, who forcibly and against the owner's will, enters upon the land of another, is guilty of trespass and is liable for damages.

Concluding that this general rule covers his case he therefore makes out his pleading as follows:

2. Minor Premise and Complaint: The defendant did upon a certain day and at a certain place, forcibly and against the will of the owner, enter upon the defendant's land, etc.
3. Conclusion: Therefore, the plaintiff was injured and damaged in the sum of X dollars (another way of saying that the defendant committed a trespass to the damage of the plaintiff).

Now, in the above statements, there is exposed a complete syllogism of which the first proposition constitutes the Major Premise or general rule of law; the second proposition constitutes the Minor Premise by alleging certain facts to come within the rule; while the third proposition draws the conclusion which the judgment of the court may afterwards affirm or deny. The plaintiff's complaint thus expresses the Major Premise by implication and the Minor Premise by direct allegation and the Conclusion by an indirect allegation of damages and a prayer for judgment.

Suppose that the defendant, upon inspection of the above complaint, comes to the conclusion that the facts as alleged do not come under the general rule of law, he thereupon raises an issue of law by demurring on the ground that the complaint does not state facts sufficient to constitute a cause of action. What is the course of reasoning?

Answer.

1. Major Premise: Any set of facts which does not come within a general rule of law governing such facts is not actionable.
2. Minor Premise and Answer: This set of facts does not express a cause of action, that is, does not come within the rule of law.
3. Conclusion: Therefore this set of facts is not actionable.

Or, suppose again that defendant finds that the alleged facts do come within the general rule of law, but that the so alleged facts are not true as alleged, and consequently he decides to deny their truthfulness and thus raise an issue of fact. The reasoning will run as follows:

1. Major Premise: Alleged facts which are not true constitute no cause of action.

2. Minor Premise: The defendant denies each and every allegation in the plaintiff's complaint. Equivalent to—the facts are not true.
3. Conclusion: Therefore there is no cause of action.

Let us once more assume that the facts come properly under the rule of law and are also true, but that other facts exist which should be taken in connection with the facts alleged. The defendant therefore determines to modify the effect of the first legal syllogism by pleading this as new matter in confession and avoidance. Thus the plaintiff may have released his claim for a consideration and if this be pleaded in answer the form of the syllogism appears as follows:

Answer in Confession and Avoidance.

1. Major Premise: Anyone having a claim for damages and satisfying the same for a consideration is estopped from any further right of recovery.
2. Minor Premise and Answer: The plaintiff, for a consideration, released all right of damages.
3. Conclusion: Therefore the plaintiff is estopped from making any further complaint and the action should be dismissed.

Finally, suppose the plaintiff, knowing that the release pleaded by his opponent was obtained by duress, decides to offset this unfair advantage by filing a replication or reply—if so, it turns upon the same logical hinges, to wit:

Reply or Replication.

1. Major Premise: Anyone compelled by duress to release a right of action has not thereby lost that right of action.
2. Minor Premise and Reply: Plaintiff was compelled by duress to enter into the alleged release or settlement.
3. Conclusion: The said settlement is therefore void and not binding.

And so on through any number of pleadings the issues are raised and determined according to the well-known laws of logical deduction.

The Case as a Whole

The system of pleading as worked out with such completeness by the common law, and accepted with but slight modi-

fiction by modern codes, is at bottom no more than a plan by which an action at law is put upon a syllogistic basis. Each pleading in succession shifts the material of the syllogism until the fact in issue, be it a legal fact or a natural fact, is affirmed on one side and denied on the other. The final antithesis represents the premises of the syllogism which will determine the solution of the case.

An action at law, as a whole, does not then merely constitute an analogy to a syllogism, but it is one, and subject to all its rules and fallacies. Deductive logic is the science of reasoning from a general rule to a particular instance, and the practice of law is precisely that—the application of general rules of law to particular sets of facts.

Correct pleading is, therefore, but little more than correct reasoning, and since correct reasoning is compelled by the nature of the mind to follow certain immutable logical principles, a comprehensive knowledge of such principles is indispensable. Not only will such knowledge require an understanding of the nature of propositions and their relation together, but also the use and significance of the logical Term as used in the syllogism. When the lawyer becomes logician enough to realize that a failure to allege facts sufficient to constitute a cause of action is an example of the logical fallacy of Four Terms, he will appreciate just what an argument to support his demurrer will require.

It will also be remembered from the introductory chapter that the system of law has not merely appropriated the method of the syllogism, but has positively added some further rules of procedure to render the application even more precise, since it has defined in advance many of the legal concepts, has prescribed its own order of presentation, limited extensively the field of evidence, safeguarded with verification and special judicial instruction bound under the penalty of perjury, and formulated either in statute or precedence all of the generalizations which are to be applied. Legal

logic, therefore, if such it may be called, does not luxuriate in the broad fields of general science and philosophy, but restricts itself severely to the field of justice and equity between man and man under the laws of the country in which he lives.

Logical Features of the Complaint or Declaration.

One of the primary rules of Pleading is, that the complaint must allege a cause of action. This requirement implies several things, to wit:

1. That there be a proposition expressly alleged;
2. That the allegation relate to some particular person or persons;
3. That the allegation affirm the truth of certain facts;
4. That the alleged facts conform to some generalized concept of law.

Let us consider what bearing these essentials have upon the syllogism. To begin with the last mentioned requirement first, we observe, that this need arises from the fact that laws are not self-applicable. Statutes are not axiomatic, stamping machines, which affix their impress upon wrongful acts of men without any adjustment through human agency. In short, the complaint must perform this very office of bringing questionable acts under the test of legal principles. A complaint, therefore, should aim and succeed in alleging the elements which constitute a concept of law to which has been attached, either by legislative enactment or by precedent, a rule of law and a corresponding penalty. Moreover, this concept and rule of law must be so obviously applied and suggested from the character and mode of the allegations, that the court which takes judicial notice of all relevant law is apprised without notice of the general rule invoked. Thus the legal offenses, such as burglary, larceny, robbery, or embezzlement, are concepts of criminal law con-

cerning each of which is attached a general rule of conduct and penalty, and the courts are presumed to take judicial notice of the elements involved in these crimes. However, the court determines which of these legal principles is being invoked wholly from the contents of the complaint itself. No oral modifications are allowable, hence the complaint is a very precise and important document. From the number and nature of the actual facts, the pleader must judge in advance what concept of law, if any, or what preferred one, if two or more, he may raise by his allegation, and he must not raise more than one at the risk of being thrown out of court for duplicity, nor dare he confuse two distinct concepts, but he must so identify his allegation both in material and form with a single legal concept that a defendant with reasonable intelligence may be able to prepare a proper defense. Should the complaint fail to do this it is void, for it alleges no cause of action, since a cause of action is not merely a group of facts, but a group of facts of such a description and mode of allegation as to raise a rule of law. Such rule, it is needless to say, is the major premise of a deductive syllogism. And all laws, except those governing a particular case, are tabulated, classified, and systematized major premises to be applied to the special facts of life as they arise. But the complaint does much more than necessarily imply some general rule of law as a major premise, for it accomplishes this end while engaged in the very process of formulating a minor premise. Thus, a true complaint formally brings the subject of its allegation within the rule of law, or major premise, and hence renders it subject to its consequences.

This then brings our attention to the second requirement enumerated above—that the allegations relate to some particular person or persons. In other words, we do not prosecute or sue trees, hills or hillsides, but laws are intended to be enforced against individuals, hence a complaint must charge

actionable facts, or facts to which the law has affixed a command, or prohibition, or penalty against persons committing them. As a result, the complaint must set out a particular proposition or allegation more or less complex in structure, not unusually a compounded predicate in form, which brings some specific individual or individuals within the embrace of the general rule of law, and in so doing becomes a typical logical Minor Premise, copulated with a Major Premise, unfolded by implication as a general rule of law during the same process. The complaint then, at one and the same time, and through the same allegations puts on legal record the two logical premises which, according to the theory of the plaintiff, are determinative of the proper application of law to the particular case. As already pointed out, later pleadings may dispute and change this setting for the final trial on the merits of the case.

Again, it is a requirement of a good complaint that it affirm the quality, known as the truth respecting the facts. It is the function of the complaint to declare its facts positively, and neither to propose questions, indulge in speculations, hypothecate conditions, make entreaties, argue, issue commands, express emotion, or rubricate by way of recital or assumption. It must allege, affirm, and flatly assert, and not engage in circumlocutions and explanations through an entanglement of participles and conjunctions. But this is exactly what logic requires of the Minor Premise to a syllogism. There must be an unequivocal identity in whole or part alleged between the actionable facts and the defendant, and this can be done only through the form of an absolute affirmation in a subject-predicate combination. To be sure, in some instances there may be matter of inducement also alleged as a background for the action, but even in such cases the issue is contained in the asserted relation of the defendant to the actionable facts. The truth or falsity of such relation is in this way put directly in issue.

The last statement leads directly to the first requirement of a complaint—that there be a proposition expressly set out. The necessity of a proposition in the complaint is identical with the same need in a syllogism, to wit, a proposition is the psychological form common to all minds for the laying of stress upon the truth or falsity of a relation. Logic, consequently, for the purpose of evading error, insists upon that mode of expression which experience and social usage has dedicated to this important use. For it is almost a sacred obligation to mean what one affirms—not only to reserve this means for the one end to raise and emphasize the element of validity, but to also believe and defend the view thus affirmed. Indeed, moral law exacts this as a matter of honor from everyone, and to violate it is to constitute the infamy of lying. In fact, the liar can deceive successfully, only because this code of communication is observed so universally. Statutory law utilizes this service and usage of the proposition, although in some cases where the offense is grave, and in some jurisdictions on general grounds the statement is required to be also verified. Thus, in all these fundamental respects, the complaint but follows the laws of logic and syllogistic Deductive reasoning.

Logical Features of the Answer or Plea.

When it comes to the second pleading, the discussion will depend upon whether the Reply be one of denial, or one in confession and avoidance. If it be in the form of a denial, the logical question arises as to what is being denied. We have seen that the complaint raises into operation both a general rule of law and the facts of a specific instance of human conduct. Does the denial attack the former? Unless a specific statute has been pleaded it can not, for such an attack would raise an issue of law which by an ancient rule of pleading must be raised by a demurrer. But the com-

plaint expressly sets out a Minor Premise in which an issue of truth or falsity is precipitated. Obviously, the denial goes to the validity of this allegation either in whole or in part. The denial disputes that the facts are true as alleged. This is the real point of attack, both in the Common Traverse at Common Law and in the General Denial of Code Pleading.

However, it is not necessary to render the Minor Premise false, as a whole, in order to completely dis sever its logical unity with the Major Premise and general rule of law, for to deny and disprove any one of the facts essential to the general concept of law involved is sufficient to prevent the particular instance alleged from coming under the general rule of law presumptively raised. It is usual for the court to give accurate instructions to the jury as to the number and nature of the essentials which the plaintiff must prove in order for the defendant to be convicted or defeated. The jury is then the sole judges as to how far the denial of these facts has been supported by the evidence. The form of the allegation usually runs against "each and every material allegation of the plaintiff's complaint not hereinafter specifically admitted". This seems to put in issue a number of allegations, and hence, propositions, but the division is more apparent than real. There should be but one defendant or group of defendants in one cause of action, and to these there is usually predicated a concept of law which involves two or more essential elements. Such a group of facts essential to a concept of law can only be affirmed, and alleged, and predicated of the defendant, by means of a compounded predicate or a number of sentences. Consequently, what may appear in form to be a number of distinct and separate allegations, for logical and legal purposes may be considered as parts only of one proposition, the Minor Premise. In ordinary logic, the Minor Premise is supposed to express the material of the predicate in one term, but legal logic, on account of a rule which forbids the pleading of conclusions of law, must allege

the combined meaning of this group of facts, which really constitute but one term of the Minor Premise, by means of a separate predication of each and every material fact. Thus, by way of illustration, according to ordinary logical form, we would have:

Burglary is a Felony.

John Doe committed Burglary.

Therefore, etc.

However, according to the requirements of law, if the same proposition should be alleged in an information or indictment, it would be wholly bad to allege that John Doe committed a burglary, for the latter is a conclusion of law, and the pleading would be required to allege that John Doe did this or that thing or such particular acts which in the eye of the law constitute in legal effect the term and concept of burglary. The latter method puts the particular facts in issue rather than their legal effect, although it is to be remembered that by means of the plea, "not guilty", in criminal actions, the answer is not altogether consistent with the requirements of the first pleading. Thus we observe that several distinct propositions may be necessary to produce the unity of material which constitute the predicate of the Minor Premise. We also note that the answer may deny one, several, or all of these alleged facts, and if sustained the effect is the same, namely, to destroy the logical, and hence, the legal effect and validity of the complaint.

However, there is evidence that law in the beginning endeavored to follow the logical form without modification, since there was a form of denial at common law denominated the General Issue. For example, one species of this denial, exemplified in "Nil Debit" and "Not Guilty", had the peculiar effect, not of denying the facts alleged, but the legal effect of these facts, that is, denied the Minor Premise, as a whole, in place of its elements. It is possible, in some instances,

that the denial also controverted the conclusion of the syllogism itself, as in the case of the plea of "not guilty", which could not well be more general in scope, which permits of any defense, and which is preserved in usage to this day. It is only in the light of the involved syllogism that the nicety in significance and effect of the General Issue can be fully appreciated. To escape specific denials is to escape also specific limitations upon the evidence. Such indefiniteness and latitude has been, however, considered too great an advantage for the defendant, and has been generally abolished, except in criminal law, where the burden has always been wisely maintained upon the prosecution.

The situation is different if the answer or plea be one in confession and avoidance. Logically considered, the admission or confession is not that the two premises are legally connected, but merely on the face logically correct. They are admitted to be, parts only, of a larger whole of circumstances which the complaint has not adequately set out, and hence is an instance of where legal logic varies from ordinary logic. The latter concerns itself merely with the correct relationship of particulars and rules, but law looks into the actual background of fact. We have seen elsewhere that legal logic defines its own concepts, and prescribes the number, condition, and nature of its facts—now we perceive that it demands also that all of such facts be correctly reported. Certain facts, therefore, in a pleading may be confessed as true, but at the same time not true for the purpose and effect for which they were originally drawn up, that is to say, their legal effect as the Minor Premise of a legal syllogism is false, because the facts have been used falsely, not having been given in their actual setting of experience, but abstracted from a larger whole of circumstances. Thus, a part removed from the whole of which it is a part no longer appears in its true significance, and it is this falsity of a want of

completeness against which an answer in Confession and Avoidance is directed. ▸

The effect of an answer in Confession and Avoidance, from the syllogistic side, is to eliminate the general rule of law as inapplicable to the actual and complete set of facts, and by means of the new matter which is added, completely change the coloring of the Minor Premise, so that it no longer expresses any cause of action against the defendant, or one of a different import and effect. In such manner the whole legal syllogism, as first set up by the complaint, vanishes. However, it does not follow that a trial will be made unnecessary, for the new matter alleged in the answer may in turn be denied, and this issue of fact will then be tried upon its merits. In such case the validity of the primary syllogism is held in obedience until the latter question upon which it is now conditioned is determined. If the new matter is relevant and proved true, the whole original cause of action will disappear, or be modified, but if not, then the two premises alleged in the first pleading will become legally effective without further proof.

In addition to pleadings by way of denial or confession and avoidance there may occur an answer calling for matter especially pleaded by way of estoppel, or otherwise, as for instance the Statute of Limitations, Statute of Frauds, Res Adjudicata, or defenses in suspension or abatement of the writ. What particular relation have these and other similar special pleadings to the syllogistic premises set out in the plaintiff's complaint or declaration? Unquestionably we have here another example of what was pointed out in the first chapter to be a variance of legal logic from ordinary logic. Somewhat in the nature of an avoidance without a confession, it does not deny the truth and validity of the rule of law to the case, nor does it question its applicability to the facts as alleged in the Minor Premise, but it does a very unique thing—it invokes a wider rule of law within which

the rule plead in the first pleading is but a part, just as in Confession and Avoidance, a wider sphere of fact was plead—and thus it challenges the right of the plaintiff to put the special set of facts in issue. Hence, a greater rule of law is plead against a lesser, a more comprehensive syllogism over a lesser—the first plead by alleging the Minor Premise and implying the Major Premise, the second by pleading the Major Premise and implying the Minor Premise.

Relation of the Rules of Pleading to the Syllogism.

It is valuable for the student of law and the practitioner to fully appreciate the fact that most of the rules of pleading brought down from the common law, have a direct logical bearing, that is, they are directed to secure the proper observance and execution of the rules of the syllogism.

Rules for the Production of an Issue.

1. After the declaration the parties must at each stage either demur or plead.
2. A traverse must not be taken upon matters of law.
3. A traverse must not be taken upon matter not alleged.
4. Every pleading must be an answer to the whole of what is adversely alleged.
5. Every pleading in confession and avoidance must show color.
6. An issue when well tendered must be accepted.

Thus, the first rule which demands that the plaintiff having declared, the defendant must either demur or plead, simply means that the syllogistic premises set out in the declaration or complaint must be attacked or questioned, first, as to the logical relation of the two premises together as it appears upon the face of the allegation, or, secondly, as to the truthfulness of the facts as alleged in the Minor Premise. This is merely the law of ordinary logic, that any error in the

Conclusion of a Deductive syllogism must be either traced to the form or to the materials. The materials may be true, but the form of logical connection false, or vice versa, the form may be correct, but the materials false. The result is bad in either case.

But if he plead he must either deny or confess and avoid, or in some cases plead special matter. This requirement resolves itself into a choice between denying the truth of the Minor Premise as a proposition, or of confessing the truth, but denying the legal effect of the facts alleged, because of their inadequacy in reporting the whole truth. This is a constructive denial which asks that a better Minor Premise be substituted for the insufficient one. Such added material of fact constitutes matter in justification or excuse, and the result, if sustained, is to totally invalidate the first syllogism. It is the substitution of a syllogism based upon the complete facts in answer to a syllogism based upon partial facts only. Herein we have a smaller area of facts, subordinated and absorbed under a larger and more complete circumference of fact.

Analogous to the last statement above, the effect of pleading in answer, some special matter, as the Statute of Frauds, Statute of Limitations, Res Adjudicata, Estoppel, etc., is to substitute a superior rule of law for the one set forth in the Major Premise. Ordinary logical theory requires but truthfulness only in the materials of the syllogism and form, but legal logic adds the social elements of justice and equity, and in so doing recognizes that under some circumstances a man has either not yet acquired a right, or has lost the right to bring the matter within the operation of the courts for adjudication. Such a comprehensive rule of jurisprudence and procedure is based upon the highest and widest principles of humanitarianism. Logically, it amounts to the subjection of a more comprehensive syllogism in answer to a more limited one, but in no instance is the realm of logic abrogated. As

the pleading in Confession and Avoidance emphasized the substitution of a larger area of fact over a smaller, so the pleading of special defenses emphasizes the substitution of a superior rule of law over an inferior rule.

The second rule, that a traverse must not be taken upon matters of law is, obviously, intended to prevent questions of legal technicality from going before a jury. The legal form being subject to logical laws demands a trained mind to properly adjudicate while matters pertaining to facts may be safely intrusted to the judgment of the ordinary citizen.

The third rule, that a traverse must not be taken upon materials not alleged, is designed to insist that the material to be tried must first be thrown into the logical formula of a syllogism requiring propositions, in order that both its logical and legal effects may be properly ascertained. Materials not alleged are, *prima facie*, not relevant and have no apparent logical connection with the merits of the case.

The fourth rule, that every pleading must be an answer to the whole of what is adversely alleged is, most probably, intended to preserve the unity of the Minor Premise, which though often composed of several elements forming a group idea is logically one proposition. The rule tends also to put in issue, if not admitted, every issuable element without which the two premises can not be tested as to the perfect identity of their common term.

The fifth rule, which commands that an answer in confession and avoidance must show color, was originally designed to prevent what was known as inconsistent defenses. It is clear that the theory of excuse or justification is based upon the idea of confession, and that confession is incompatible with the idea of denial. The rule, therefore, ought to compel the answer to elect one or the other course. The logical effect of the two is widely different, a denial destroying the force of the syllogism as it stands, and a confession and avoidance substituting a more comprehensive syllogism. To

give color, therefore, means to make the confession unmistakable before building a larger concept of law thereon. The function of the rule is to insure exactness of the legal premises.

Finally, the rule that an issue well tendered must be accepted is plainly intended to prevent any side-stepping, or sophistry—that when the issue is clear it must not be evaded. Ordinary logic is much impeded by this form of argumentative filibustering.

Rules on the Materiality of the Issue.

1. A traverse must not be taken upon an immaterial allegation.

2. The traverse must neither be too broad nor too narrow in scope.

The first rule that a traverse must not be taken upon an immaterial allegation aims to confine the issue within the contents of the legal concept contained within the premises of the syllogism of the preceding pleading, for otherwise a poorly constructed pleading which alleges facts that fall outside of the legal concept, which do not affect the character of those within, and which have no legal connection therewith, may lead the answer to scramble over the whole ground, relevant or irrelevant, and thereby confuse and obscure the true issue.

Another important rule going to the materiality of the issue, namely, that the denial must neither be too broad nor too narrow, seeks to identify the matter whose truthfulness is challenged with the matter which logically and legally comes under the rule of law. And this is the measure which determines whether the denial under or overreaches, and in either case raises a question which is not logically nor legally proposed. The truth or falsity of no proposition is ever legally raised for adjudication, unless it constitutes facts

logically framed into the primary basic syllogism. Rules of law, applied in pleading, are not elastic bands expanded or contracted to fit the materials in hand, but the materials must, in the nature of circumstances, fall by virtue of their intrinsic character within these fixed formulas of law. As already said, the terms of law and the rules embracing the same are defined and unalterably fixed by statute or precedent, and hence, when quantity as well as quality of fact is essential to a legal concept, the denial must cover such ground precisely—no more and no less. Any variation from this requirement would necessarily result in a logical fallacy of Four Terms.

Rules on the Singleness of Issue.

1. A pleading must not be double.
2. It is not allowable to both demur and plead to the same matter.

The rule against duplicity which commands that but one cause of action must be joined to one demand, and that one adequate answer is sufficient, recognizes that but one logical conclusion and legal judgment can be derived by Deductive reasoning from a single Minor Premise joined to a single rule of law. To permit otherwise would violate the fundamental requirement of logic that there be but three, and only three propositions in a syllogism. What an anarchy of inference and multitude of errors would lurk in an admixture of several premises, several rules of law, and one demand, only he who is familiar with the numerous pitfalls of logical reasoning can thoroughly appreciate. When we reflect that out of sixty-four possible syllogistic combinations where but three propositions are involved there emerge but eleven valid Conclusions, then we begin to understand the importance of a rule against duplicity. To be sure when different causes of action are parts of a series alike in nature

and effect, and at other times when they grow out of the same subject-matter, or again, when, as in the common counts, the exact nature of the cause of action remains to be disclosed by a subsequent pleading, or by the evidence more than one cause of action may be alleged in the same complaint, but after all, this is a compound complaint in which each cause is based upon its own syllogism and asks for a separate conclusion, and is but an economic method of disposing of several actions in one suit, while the rule against duplicity insists that in these cases there must be no intermingling of different counts and demands.

So also the rule against interposing both a demurrer and a pleading to the same subject-matter in the same pleading is a prohibition tending to prevent two issues, one of law and the other of fact from becoming confused in the same conclusion. The two questions are wholly distinct, and must be disposed of separately—the one going to the form of the syllogism, and the other to the truthfulness of the premises; the one disputing the proper relation of the premises to each other, and the other the validity of the propositions as statements within themselves.

Rules on the Certainty and Particularity of the Issue.

1. Pleadings must allege with certainty, place, time, quality, quantity, value, parties, and identity of objects.
2. Pleadings must allege with certainty in some instances, right, title; possession, and authority.
3. Pleadings must not allege conclusions of law, evidence, matter judicially noticed, matter necessarily implied, presumptions of law, or matter coming more properly from the other side.

When it comes to the rules tending to produce certainty or particularity of issue, the law enlarges upon the ordinary logical field. It has been noted elsewhere that law not only fol-

lows the rules of the syllogism, but provides a number of supplementary rules which provide for the proper application of syllogistic reasoning to actual life conditions. Law not only reaches conclusions through logical processes, but also applies the results to actual solutions of practical disputes. It is plain that the terms which are required to be repeated in the three propositions of the syllogism should be made so specific and so conclusively marked that their identity is unmistakable. This is all that ordinary logic requires, but legal logic undertakes to apply these terms to actual facts, objects, and circumstances in life. A further identification is, therefore, absolutely necessary. The material used in the allegations must be identical with the material to which they are supposed to apply. Ordinary logic is satisfied with a conclusion following logically from the premises, but legal logic must put the conclusion into the terms of a legal judgment referring to particular persons and things. Thus, the rule requiring particularity of parties aims not only to identify the parties referred to in the premises and between the premises, but to identify these same parties with the litigants in the case. The one identity operates only between the premises, the other between the premise and objects in real life. So also time and place must be especially alleged when these are of the essence of the action, or to adjust the action to the proper machinery of court, witnesses, and jury. Since the action may relate to the disposition or condition of property in some form it is essential usually that the property alleged be identified by actual description with that for which it is supposed to stand. In fact, the form of the syllogism must have real, actual, and genuine content and not be playing a purely hypothetical game. And inasmuch as the conclusion expressed in the judgment involves an estimation of relief the pleading is therefore required to specify quantity, quality, and value as a basis for such recovery.

The second rule is an extra legal precaution, and is in a

sense preliminary to any proper action at all. As a foundation for a suit it may be required that one or both of the parties allege jurisdictional facts, show authority, or allege right, title, or possession, and while these are appendages to a legal Minor Premise, still the issue in the trial may be avoided, suspended or adjudicated upon the truth or falsity of these conditional facts rather than upon any express acts of the parties. This is a provision peculiar to the machinery of legal logic which operates not only to decide issues, but to govern their mode of coming up and the final application of the same.

The third rule above set out against pleading presumptions of law, matter judicially noticed, matters necessarily implied, matter coming more properly from the other side, evidence, and conclusions of law must be considered in its separate phases.

If we keep in mind that pleadings are designed merely to prepare for a legal battle by reducing the contentious material to debatable issues and that this is done by throwing the material into a syllogistic formula which presents both issues of law and of fact, we at once perceive that it is a violation of certainty to ostensibly raise an issue which is settled in advance by provision of law, such as a presumption of law or matter judicially noticed. Such matter is already undebatable and its relation to the case is fully implied. As to matter necessarily implied the same reasoning applies. Details and conditions which are subsidiary to some other issue, and which are made constituent parts of the issue by nature without allegation, need not be alleged since the superior will absorb the subordinate, and the whole will be raised in one issue rather than be separated and split into two separate questions. Moreover, to litigate separately questions which have a necessary relation of whole and part, or whole and attribute, amounts to a logical divorcement of things which

find their only true nature in unity and leads to a peculiar duplication and confusion of evidence in substantiation.

Respecting materials coming more properly from the other side, we encounter the objection to anticipating defenses. However, defenses, which are defenses only because by a general rule of law they are required to be pleaded as preliminaries in order to qualify for the trial of the particular issue, are limited to such facts as constitute a *prima facie* right of the pleader. When these are alleged the plaintiff has really set up two syllogisms, to wit, one on the right to bring the issue to trial, and the second on the merits of the issue itself. Of course, the first being the more fundamental may remove the second. But no defense should be pleaded, except what is necessary to establish a *prima facie* case. To allege an issue, and also an answer to an anticipated defense to such issue, is to at once raise two issues co-ordinately, which should bear a subordinate relation and be decided on the strength of the defense alone. To both prove a proposition and disprove a defense against it amounts to a double proof, both positive and negative, without a recognition of the duplication. The reason for this rule is, thus, to make and keep the issue definite and certain for purposes of marshaling evidence, hence to confine the litigation to a settlement of the issue by holding it to one proposition rather than having it debatable on one or more subordinate propositions. The very purpose of a series of pleadings is to shift the debatable issues from more general to more specific grounds and to at last, in the final pleading, pin the outcome of the whole superstructure upon the outcome of the last subordinate contention. To plead anticipated defenses renders the situation obscure, because it puts the same question in issue more than once and sometimes under a form which would not otherwise arise. Certainty in a logical syllogism requires that the same content be given the same form so that a variation in meaning may not be possible.

The grounds which would debar anticipating defenses are equally antagonistic to the pleading of evidence. They are parallel in their effects, the former raising the same issue two or more times, once positively, and then negatively, and the latter doing a similar thing by raising the issue at first, primarily, and then secondarily, through alleging a ground of support. It is plain that the raising of the same question as distinct co-ordinate issues, or as combining to form one issue, when, in fact, the true relation is that of principal and subordinate, and each succeeding allegation is and should be a substitute for the one above, is a serious cause of uncertainty. Assuredly, if evidence is plead, it is alleged and proposes an issue of fact. To prove such evidence, however, is equivalent to proving the main proposition so that a needless duplication of the same issue is produced and uncertainty is sure to follow. One statement of the premise is sufficient, but to plead either defenses or evidence is to repeat without becoming a substitute and under a different form the same allegation.

Closely analogous to the rule against pleading evidence is that against pleading inferences, or, what is more generally known, as "argumentative pleadings". While an inference may be based upon evidence, it need not be so, but may rest upon some principle or generalization. So also, an argumentative pleading is sometimes made in lieu of the main facts, as in the historical pleading known as the "absque hoc". But to allege an associated fact, even though it be strongly suggestive of another, is not to allege the latter, but a suggestion merely. Furthermore, a fertile source of error reposes in this indirect method of allegation. Thus, a denial, pleaded in answer to the Minor Premise of the complaint, should put the proposition in issue, but a denial of some other fact alleged by way of inference may not put in issue the actual fact at all, for to deny a fact by denying an alleged cause of such fact may not disturb the main fact

which may rest upon other causes, grounds or conditions. In short, this is equivalent to pleading a conditional proposition and syllogism which is open to the two fallacies of Affirming the Antecedent and Denying the Consequent.

Finally, that phase of the rule directed against pleading "conclusions of law" merits especial attention, since it seems to stand in direct contradiction to another rule which prescribes that facts should be pleaded in their "legal effects". Now "legal effects" and "conclusions of law" are at bottom one and the same thing and, consequently, these rules seem somewhat confusing in application. Nevertheless, the two rules are made harmonious and compatible when the point of view from which each is made is distinguished. And this springs again out of the nature of the syllogism involved in pleading. An inevitable rule of deductive reasoning is that the conclusion to be drawn from the premises must never either implicitly nor openly be expressed completely in one of the premises. Such a proceeding begs the question and assumes what is to be proved. Of course, if the conclusion is packed away into one of the premises it can be drawn out as a conclusion. This is the notorious error of *Circulus Probandi*, or argument in a circle, also known as the fallacy of *Petitio Principii*. The prohibition against pleading "conclusions of law" is aimed against this mistake, for in some cases the main question is, whether or not a certain conclusion of law exists. Thus it may be that the judgment sought from the premises is that A and B entered into a contract. Now it is plain that a contract is a conclusion of law, and it is also what is to be ultimately proved in the case. But it would be the grossest logical, and hence, legal error to allow this to be alleged as one of the grounds or premises of its own proof. No doubt to deny such conclusion of law would hold up the fallacy, but such a pleading and such an answer would not have reduced the question to any issue or issues at all.

However, there is another reason since allegations in pleading are intended*to raise issues of fact and not issues of law, and where issues of law are based upon issues of fact they can only be settled by a trying out of such facts. The failure of the pleadings is what raises an issue of law, and a successful one, an issue of fact. However, an issue of law is consequently formally raised by a demurrer which is not technically considered a pleading at all, but a protest to the correctness of the pleading. Issues of law must, therefore, be attended to first, to clear the deck for the battle over issues of fact. Now to permit the unregulated pleading of conclusions of law would be to evade a specific allegation and trial of the very facts upon which the conclusion rests. The introduction of evidence in such a case would be forced to hover about generalizations instead of concrete facts, so that the utmost condition of uncertainty and obscurity upon the exact bearing of the testimony would result. Inevitably the materiality and relevancy of evidence would be most difficult to decide. The whole trial would become a series of surprises and inconsistencies. In criminal law only is the General Issue, or a conclusion of law permitted to be pleaded, and then only as an answer and because it is a fundamental safeguard to give the defendant every presumption of innocence and allow a general defense. So, also, it may be added that the plea of Not Guilty is really not the purest form of a conclusion of law, but a conclusion of Mixed Law and Fact growing out of a regulative concept for the prohibition of facts, "malum in se". The plea of Nil Debit is also still allowed in certain jurisdictions, but its illogical effects have been eliminated by a statutory provision defining exactly what issues it is capable of raising.

The first prohibition is, therefore, a provision against the uncertainty of waging a war of generalizations coupled with its attendant dangers of logical error, but there is also a danger from the opposite extreme. To evade a world of

abstractions, only to plunge into a labyrinth of details, is, assuredly, an equal process of folly. The case has its roots in wide areas of circumstantial detail. Should these details be pleaded in full? Obviously not, for just as much uncertainty as to the points upon which the case turns will ensue from pleadings loaded down with a deluge of details as from the other extreme. Clearly, then, there is only one logical recourse, and that is a middle ground. It is for this reason that the rule also requires that only the "ultimate facts" be pleaded, and that they be pleaded in "their legal effects."

As to just what is meant by the phrase, "ultimate facts", is not altogether clear from the authorities. Evidently it recognizes that facts are disposed in a certain order, and that the facts representing the terminus to such series should be pleaded in preference to those leading up to such culmination. But what kind of a succession is here implied, one based upon a chronological series or one based upon a logical development. From the barren viewpoint of time succession alone, it is hard to see why the last fact should be of any more significance than the first or any preceding one. The real principle must be found from the logical point of view. And if we remember that certain facts are actionable in their nature, because the law has made them essential elements in certain concepts of law, and also that these facts when they occur in real life are necessarily preceded by a train of circumstantial details, we see a vast distinction between these two classes of facts. From the most remote which fall outside of the circle of relevant material, these facts gradually and logically become more legally significant until we reach those which belong in the actionable class itself. Plainly, therefore, the facts which must be alleged in order to raise a rule of law are the facts which are described as the "ultimate facts", for they are ultimate in the sense that they must be proved while the chain of facts or circle of facts, or both, which constitute their penumbra, constitute the body

of evidence by which such proof is to be made. To allege the "ultimate facts" is, therefore, but a reverse of the rule against pleading evidence. Moreover, such facts are ultimate, also, because they are facts in juxtaposition to conclusions of law—out of ultimate facts in proper kind and number arise the concepts of law.

In this connection we are now prepared to understand also what is meant by pleading facts "according to their legal effect". Now and then it occurs that a concept of law contains an assemblage of factors which themselves fall into lesser legal concepts and hence groups. Thus, a concept of law may be constituted of a group of groups of fact. The concept, known as a contract, for instance, is made up of two subconcepts of law, namely, offer and acceptance, each of which has a well defined content of fact. In order to follow the rule of pleading the "ultimate facts" we should be obliged to allege the several facts which are essential to a legal offer and acceptance. In such case a close discrimination would have to be made between a mere advertisement or inducement to trade, and an "offer", as well as the difference between a continuing and a temporary offer and further between a receipt only and an acceptance. The law, however, in cases where the data of the main concept or conclusion of law scatters and organizes about two or more subconcepts, holds that certainty is more easily conserved by pleading these group ideas as composite units, which is to say in their legal group names, or legal effect. This does not violate the rule against pleading a "conclusion of law" in the sense contemplated by the rule, because the conclusion of the main syllogism is not that of an offer and an acceptance, but a contract or union of both, hence the fallacy of assuming the question is avoided. However, it may be contended that no fallacy of assumption will occur if a proper denial puts the legal concept in issue, and this may be admitted, and it may be further added that

the main concept of law may turn upon the validity of a subconcept, so that the main conclusion may be equally begged in one of the subordinate "legal effects" pleaded. All this may be admitted without still removing the problem of uncertainty. The fundamental reason, therefore, for objecting to a pleading of the main concept, or "conclusion of law", is to force the issue from the form of a generalization into that of specific facts, so that the marshaling of evidence can be classified; and on the other hand, to insist upon pleading the "ultimate facts" according to their "legal effect", for the counter purpose, of not allowing the issues to wholly disintegrate into a mass of evidentiary details.

Rules on the Saliency and Simplicity of Issues.

Again, it is a fundamental of good pleading that the Complaint or Answer shall be free from ambiguity, circumlocution, prolixity and obscurity. This general rule in its several phases is designed to prevent the fallacies of logical reasoning growing out of an inaccurate use of terms. Not terms rhetorically used to refer to words scientific or otherwise, but terms as the word is used in logic, to refer to the area of meaning, forming the subject or predicate of syllogistic propositions. It is an absolute prerequisite to all syllogistic validity that the Terms employed in the premises and Conclusion of a syllogism, when used more than once, must remain precisely alike in content and meaning, both as to quantity and quality of material. Since many of these Terms are concepts of law, whose elements are defined by statute or precedent, it follows that the pleader must know these exactly and be skilful enough in the use of English to embody the same accurately. Any verbosity or illy chosen words are apt to produce a variation in meaning, and such a result is more apt to occur in connection with the Middle Term. When it does, there will naturally follow the error of Four Terms.

Not infrequently the inability of the pleader to avoid the use of participles, complex constructions, conditional clauses, or loose sentences from a lack of skill in composition, renders a pleading little less than a badly worded essay. Such a conglomerate of verbiage is a travesty on the science of pleading. The language should be precise to a fault, direct to a finish, and simple to the last detail. Alas, how few in this day of relaxed exactness, along with relaxed technicality and fixity, measure up to such a standard. It is not a perfection in technic for the sake of form that is sought, but rather a mastery of form for the sake of accuracy and truth.

CHAPTER III.

INDUCTION AND OTHER FORMS.

Generally.

Induction is the process of inferring a general rule from the examination of particular individuals or instances which form a class. Briefly stated, it is passing in thought from the particular to the general. All learning and acquiring experience consists in forming these general concepts from individual experience. Deduction then applies these known formulas to new experiences in order to interpret and classify them for use. Deduction and Induction therefore complete the cycle of thinking and reason.

Kinds: Induction is of two kinds, namely: Perfect and Imperfect.

1. Perfect Induction applies where every individual of the class is examined and the conclusion expresses a certainty or where certainty is reached through other means. Illustration of the first method: Where it is proved that all of the months of the year have less than forty days through an examination of each separate month.
 - a. This form has been challenged as not being a true induction since it expresses no more in the conclusion than was found in the premises, being merely a formulation explicitly of what was previously wholly implicit and hence of no new value. The answer is, that granting the fact stated, it is still valuable for deduction does not transcend what is implied in the premises and is not rendered valueless for this reason, but rather until the inference is made, it can hardly be said to be a clear possession of the mind. The application of this method must necessarily, however, be somewhat limited from

the lack of instances when a class may be canvassed throughout.

- b. Another method of perfect induction is comprised where the rule inferred involves the expression of a cause and effect relation which is fundamental to the species. That is, suppose the examination of a specimen of animal of strange structure, which structure is the resultant of some well known cause also present in the animal. Without examination, therefore, of any other examples of the class the conclusion can be affirmed with absolute certainty that this structural effect is common to the class.
 - c. Again, another method of perfect induction results where the peculiarity of the species is made by construction, that is, made to order. For example, suppose by definition or construction, we say that a triangle shall be a figure composed of three and only three angles. It is easy to see, therefore, that we may with certainty allege that all triangles are possessed of three angles.
2. Imperfect induction claims by far the wider application, and, hence, utility. In place of reaching certainty in its conclusion it never reaches more than a high degree of probability, or what is sometimes termed, moral certainty. In fact, its value in a particular application varies with the degree of probability reached and this depends in turn upon two considerations.
- a. First, the number of individuals examined in relation to the whole number. However, the validity does not increase in exactly the arithmetical ratio, for up to one-half the value is very low, but once over the half-way line the probability rises by leaps and bounds.
 - b. But again the question of quality enters into the computation. Not all individuals are normal examples of the species and the very element or fact sought to be universalized may be some abnormal characteristic and barnacle of the species. Thus, the

power and force of inference will be strengthened or weakened by the select nature of the cases examined. This feature must, therefore, be estimated in connection with the question of number. Of course, the more nearly the entire class is investigated the less importance will the question of quality possess, totally disappearing when all are examined, but being, on the other hand, a decisive factor where the number considered is low and the leap of faith consequently great.

Refutation: The only methods of successfully attacking perfect induction is to show that in the first instance not all of the examples have been canvassed; in the second, that the relation is not one of cause and effect, and in the third, that the construction is wrongly interpreted.

1. Of course, an induction is never stronger than its weakest link, and, hence, to prove one exception disproves the truth of the whole, hence the importance in refutation of this particular form of reasoning to examine critically the examples employed and, if possible, produce other individuals which have been overlooked or were not within reach.
2. Again, when the method or materials seem to be unassailable, the lack of any essential relation between the fact claimed and the nature of the object may be used effectively in some instances to weaken the inference. This is not a question of imperfect examples canvassed but of incidental association merely.
3. Since by the second method certainty is never reached, the effect of such an inference may sometimes be counteracted by proving an associated fact, also true, which nullifies or impairs the use of the inference, however strong, for argumentative purposes. In short, show that it proves too much to be of any service as evidence in this connection. This device as a last resource may sometimes be used most effectively, that is, admit the truth and then prove that this amounts to its very undoing as an instrument of proof. It may be used in all arguments.

4. Most frequently an imperfect induction, while it can not utterly be destroyed, may in effect be weakened by proving the basis of the inference too limited, and hence, practically worthless.

Traduction.

While the inference in deduction passes from a general rule to its application to a particular individual and in induction passes from several or many particular propositions to one general proposition concerning all, it is possible and practicable for an inference to pass from one particular proposition to another particular proposition or one general proposition to another general proposition. Thus while deduction and induction consist in reasoning from a proposition of one scope or width of application to a proposition of a lesser or greater scope of application, in the third method the reasoning passes merely from a proposition of a given scope to one having an equivalent scope—it is thus well named, traduction.

Value: The value in this latter method lies in extending the field of identity between the objects to something more than the mere fact of their being identified—it emphasizes some feature in which they are identified and this relation hitherto indistinctly recognized by the mind, when vivified and made more definite and precise, amounts almost to entirely new knowledge for the purposes of thinking. Thus:

The Supreme Court is the highest court in America.

The Supreme Court is the most learned judicial body in the world.

∴ The highest court in America is the most learned judicial body in the world.

Form: But it is a mistake to suppose that the conclusion reached by this method always, as in the above example, expresses a relation between two objects or individuals. Sometimes the conclusion is a relation between one individual and merely some attribute or characteristic abstracted from another individual, as for instance:

God is the Creator..

God is omnipotent.

∴ The Creator is omnipotent (an attribute).

Contrast the point of emphasis in this from the following in the first form:

God is the Creator.

God is the Omnipotent (noun).

∴ The Creator is the Omnipotent (an object).

However, such attribute must be true only of the one individual to which it is predicated. If the attribute omnipotent belonged to another individual than God the process would at once become deduction, for it would affirm the Creator to belong to the class of omnipotent beings.

Refutation: This form of argument may arise in law in some such cases as the identification of documents, forms, etc., or when the issue rests upon an interpretation of the meaning of a statute which may be construed to be either a statute abrogating the common law or one restating the same. Thus, it might be argued:

The Common Law is a question wholly of precedent.

The Common Law on this point is expressed by this statute.

∴ This statute is a question wholly of precedent.

Such an argument is valid only in cases where there is merely an identification of things at stake and hence its force is destroyed by a proof of nonidentification, either in kind or content.

Argument by Example.

An argument by example is applicable only when it is desired to prove that a given object may have a certain attribute. Attribute is here used not merely to include qualities, but anything which may be affirmed to belong to the object.

To prove by example is, then, the process of demonstrating that an object may possess a given attribute by exhibiting an object of the same species which does possess it.

A proof by example involves the successful establishing of the following facts:

1. That the object produced is a genuine specimen of the species represented.
2. That the attribute which such specimen possesses is exactly the same as the one to be proved.
3. That the specimen actually possesses the attribute claimed.

Value: The force of the argument is irresistible when true, for it leaves no ground for qualification. There are many opportunities for the use of this kind of reasoning, for example:

1. It is possible by this method to prove that man can come to believe hearsay or imaginary experiences to have been his own and actual occurrences. There are many instances on record.
2. To prove that air may be frozen. It has been done by experiment.
3. To prove that the most lowly born may die the most renowned.
4. To prove that a few cents may be a sufficient motive for murder.
5. To prove that one sense is sufficient as a basis for an education.

Argument by example can not prove, however, that an object always has an attribute, but only that it may have it, since the existence of a specimen does not prove the essential nature of such attribute. Neither does it have much weight in showing that the object under consideration possesses such attribute or ever did. Its real power is in proving possibility, while it belongs to induction or deduction to prove the probability or actuality of the same. Of course, the possibility of an attribute may also be proved by other methods, but an example is always both conclusive and concrete.

However, not infrequently the difference between an example and an illustration is overlooked. Illustration is not the same in purpose or in effect.

1. Illustration assumes the fact to be illustrated and aims merely to clarify and vivify it.
2. Illustration may employ an example (not an argument by example) or some similar thing, or a hypothetical thing as may best suit for its purpose, hence the confusion; but illustration by an

example is not argument by example, for the former is not concerned in proving but in rendering more conspicuous.

Refutation: It is evident that if the three things as stated above are requisite to this process, then to disprove any of these is absolutely sufficient to overthrow the argument. In addition it may in some cases be shown that the example is being employed to prove, not possibility, but probability or actual existence now or at some past or future time or all of the time, in which case it is doubtful, for it amounts merely to an induction from a single instance.

Analogy.

Analogy is a process of reasoning based upon a finding of partial identity between two things and inferring from the extent and importance of the identified features that still another element is identical which is evidence in support of the issue under test. Just as in traduction, there must be a complete identity between the two things so, conversely, in analogy there must be only a partial identity for the two cases compared must be distinct and separate examples of the principle sought. Accurately speaking, analogy is a subprocess of the argument by authority, for once the identity of the principle established there would follow no argumentative force in this fact were it not that the first example is reputed to be authority or has been previously shown to prove the point in issue.

Nature: However, analogy has sometimes been called a process of induction from one individual to another, but a careful examination will reveal a fundamental difference. First of all, it is necessary to discriminate at least three kinds of individuals:

1. The individual whose content seems apparently homogenous or divisionless—more of a onenity than a unity, as for instance, a piece of chalk, where to common observation the externality seems more significant than its internality.

2. The individual of compact organization, but having varied and interesting internal relationships, as for instance, the body of a plant or animal. Here is a complete unity of parts to the natural eye.
3. The individual of loose organization, but nevertheless having a central unifying center and principle, well illustrated by groups, classes, sets of circumstances and even transactions which are coherent enough to be roughly bounded. This is the unity of multiplicity.

Now the process of analogy analyzes any two of these individuals, not only respecting internal relationships and parts and attributes, but also respecting the outward relationships which attach to these individuals in an effort to identify a parallel group of relations. Of course, the content related can not be identical or there would not be the separate individuals, but the disposition or relationships may be logically identical, as for example, the mathematical ratios: $2:4=8:16$.

In this process we proceed from one relation to another relation of space, quantity, time, number, and a multitude of others, and in so doing, seem to be making an inductive examination of all of the objects in a class although the class be made up of the elements of the particular individual. However, this is as far as the likeness goes, for:

1. There are two sets of things being compared here which is not true in induction.
2. The inference sought is one binding the two sets of circumstances together into a more or less complete identity which is not like an induction.
3. The conclusion reached with reference to either individual is not something true of all of its set of circumstances, but with reference to some particular one upon which the issue to be proved is decided or affected. Thus, the conclusion expresses a statement concerning a particular thing in the set of circumstances and not a general rule affecting them all as it would do in an induction.

Value: Legal reasoning upon points of law especially employs an extensive use of analogy, for whenever a case at law is cited in support of a proposition, its force rests upon the basis of an analogy between the

present and past cases. It thus follows that merely to cite a case amounts to begging the question unless it is followed by an explanation disclosing the presence of an analogy. To do this means a thorough analysis of parties, subject-matter, injury, relationships, and a close scrutiny of those slight differences of fact which so often make radical differences in rights and obligations. The danger in the use of this form of reasoning is to forget that unless the case referred to is good authority and known to be good authority to the court, the analogy is of no force, however completely proved; or on the other hand, being impressed by the genuine value of the case cited, there is a danger to overlook the fact that its strength has no bearing upon the present case merely through citation, but only in so far as an analogy is established. Too often the analogy is assumed rather than proven to the court, or only indifferently shown, revealing to the court the confusion in the mind of the attorney or a possibility of clever trickery. Two or three cases well established are more effective than a dozen or more loosely referred to. It is not the pile of books which measures the strength of the argument. Such an overload of references was called by Milton "a paroxysm of citations." The question in a majority of cases is as to the application of a general rule or exception to the particular case rather than as to the rule itself and the argument from analogy is forcible only as the resemblance is close on all vital points.¹

Refutation: As in induction, the value of the conclusion will rest upon the number of identities established in comparison with the total number of relations to be compared and the fundamental character of the relations which are identified or refuse to be identified. The analogy, in idiomatic phrase, must "go on all fours", which is to say that it must be an excellent and clear parallel. Manifestly to refute an analogy there must be shown to be more significant difference than likeness, or that the identities pointed out are not actually such, or that they are not of a fundamental nature.

¹ Goodwin v. State, 96 Ind. 550, 573; Keats v. Keats, 32 L. T. 321 (opinion by Lord Chancellor Cresswell). See also Grimsley v. Atlantic Coast Line R. Co., 1 Ga. App. 557, 57 S. E. 943; Elliott's Work of the Advocate, 48, 49, 428, 429.

Argument by Authority.

Argument by authority is the process of proving a proposition through quoting the affirmance of the proposition by some competent person or authorized expression. This form of argument is perhaps more commonly used than any other on account of its apparent simplicity and effectiveness, although its real value is often grossly exaggerated.

Value: The value of this argument varies under the circumstances from that of the irrefutable to that of sheer nonsense. Once again the principle of constructive power enters in for a constitution, charter, or statute may be the duly authorized expression upon a given proposition and where cited in proof of the same is, of course, final and determinative. When, however, the authority cited is merely some individual's assertion it may be in some instances nothing more than the vagary of a presumptive mind. Authority may be classified as:

1. Legal—Which is authority by construction, and hence, binding.
2. Scientific—Which is authority by virtue of training, accomplishment and reputation.
3. Moral—Which is authority by virtue of origin, influence and ideal.

The argument, by authority even from statutes, is at best indirect and circumstantial evidence since the accuracy and veracity of two minds is always involved, to wit:

1. He that makes the original assertion may have made a mistake.
2. He that utilizes the original assertion in an argument may also create error.

It is obvious that the honesty and ability of both these agents is involved in all argument of this kind.

Legal: The argument from legal authority is wholly imperative in most cases although under certain circumstances where statutes or decisions conflict in any manner, a question of better authority arises. Still it may be contended that in law there is but one authority and it is rather a question as to which statute or case is the law. Theoretically, the latter point is true, but in

practice it becomes necessary to follow the one or the other and hence to measure the relative weight of authority.

As a rule, a reference to a constitution or charter is conclusive where:

1. The particular thing in question is unmistakably set out. But even in connection with state and federal constitutions the possibility of diverse interpretation raises a doubt, not as to the authority of the constitution, but as to just what is the constitution.
2. When referring to statutes the same question of meaning is encountered and in addition it is necessary to be sure that a statute has not been subsequently amended or repealed. It is known that statutes have been so far forgotten, even by legislatures, that they have passed laws only to discover later an already existing statute covering the same ground.
3. If it be a reference to some decision as authority to prove some principle of law, it is necessary to weigh the value of the decision carefully as to:
 - a. The court issuing the statement.
 - b. The state wherein it is given.
 - c. The number of times the case has been cited.
 - d. Whether it has generally been cited as authority on the particular point.
 - e. Whether the point in question was the turning point in the case or merely collateral.
 - f. Amount of argument employed to support it.
 - g. Whether citation of other cases in the opinion shows wide comparative study.
 - h. Whether the point was raised as essential to the decision or under "obiter dicta."
 - i. Whether the decision was rendered by a unanimous or divided court.
 - j. By what judge the opinion was rendered.

Scientific: The argument from scientific authority can hardly be said to rise to the place of the imperative, for it can not, from its very nature, be constructive, and the attempts to make the Bible an exposition of scientific truth have been wisely discarded. Since

science will always be more or less imperfect because of human limitations, this authority will continue to be only persuasive in character, varying according to the learning, honesty and experience of the scientist. Although the reference may be frequently to a book or some written work, it must be remembered that this is in reality but an expression of the author's mind and has no worth not referable to that source. Of course, some scientific facts and laws are given judicial notice in the field of jurisprudence and are therefore rendered imperative and undebatable.

Moral: The argument from moral authority is of two kinds, that is, Imperative and Persuasive.

1. The imperative form is constructive and consists usually in some code of morals or of religion, or in some instances, in the will of a person. However, there is probably no one body of constructive authority in morals which is equally binding upon all peoples as, for instance:
 - a. The Bible is accepted as the undisputed authority on morals only among Christian peoples.
 - b. The Koran among Mohammedan peoples.
 - c. Confucianism among the Chinese, etc., etc.
 - d. To those of Catholic faith the Pope is supreme authority.
 - e. To all Christians, Jesus of Nazareth is final authority.
 - f. The individual conscience is often appealed to on a moral question as having a peculiar innate binding force and it often does have the force to bind the mind, but people are being educated to believe that at best the conscience is not "a faculty" which knows everything, but is itself subject to training and education and, hence, only persuasive in its dictates.
2. Under the head of persuasive authority would be classified moral persons, acts, ideals, etc., anything, in fact, which could be construed to be the expression of a human being having a reputation for morality.

Refutation: Authority is refuted or weakened by breaking down the grounds, genuineness, honesty, power and accuracy upon which such authority is based or

by countering with an equal or greater authority on the opposite side. Not infrequently it may be shown that the cited authority was limited to a narrower field or different phase of the question than the one contested, or that the author, in making the statement, did so under assumption of qualifying conditions or circumstances not set forth. If nothing better, in cases of persuasive authority, it may be argued that it is more logical to present the grounds upon which the authority cited reached his conclusion than to give his unsupported conclusion.²

Method of Elimination.

Proof by elimination is the production of evidence through the reduction of the number of possibilities to the contrary. Sometimes the number of such possibilities is a known fact and sometimes almost beyond definite conjecture, nevertheless by the very nature of substraction itself the mind is compelled to admit a greater or less weight attached to the process.

Nature: Where the number of possibilities are reduced to two the greatest logical force is obtained and where one of these is removed the result is unquestioned certainty, but when the number of possibilities increases, the difficulty of eliminating all but one increases proportionately as well as a doubt concerning the determination of any fixed number. It is evident that the mind naturally seeks some limit to the number of possibilities in order to estimate the proportion of chances for and against the issue, but if there is no back stop the mere elimination of chances does not furnish any method of weighing the degree of probability resulting.

Kinds: There may be said to be three kinds of this argument as follows:

Elimination by alternates.
Elimination by subtraction.
Elimination by residues.

1. In the method of elimination by alternates the possibilities of the truth of the proposition to

² Elliott's Work of the Advocate, 413 et seq.; Case and Comment, "Arguments from Authority."

be proved are reduced by other forms of argument, or by a challenge to accepted knowledge, or immediate perception, or intuitive reason, to two and only two possibilities. This being firmly established, one of these alternatives is shown to be impossible, or highly improbable, or more improbable than the other, wherefore the mind is compelled to accept the truth of the remaining sole possibility. Where the mind can be gotten beyond question to a choice between two alternatives the argument is one of the most convincing and effective in all reasoning. This form of reasoning is sometimes called a dilemma and capable of two forms, to wit:

- a. Constructive dilemma where the mind is compelled to accept one or the other alternatives and only one can be true.
 - b. Destructive dilemma where the mind is compelled to hold to one or other alternatives and both are shown to be bad. This is a favorite method of disproving the truth of a proposition. In all these forms, however, the main principle is the compulsion of the mind through an elimination of all possibilities save one or two and then proving or disproving these.
2. In the method of subtraction there are a greater number than two possibilities, and, hence, though the number be definite, it can scarcely be said to be a question of alternative for in the latter the two are set over against each other usually as hemispheres fitting together and in few instances there may be a wider extension of the principle by mathematical division into parts, but outside of these cases the term alternative does not well apply.

Moreover, this method applies when number is inapplicable as in case of a steadily diminishing quantity. Suppose it be desired to show that a drowned body is in a particular locality. By dragging other localities the evidence of the truth of the claim is increased gradually as the quantity of area is lessened. If the existence of the body somewhere within a given field is positively known, as where the drowning has been wit-

nessed, the proof as to location is positive and increases as the area is dragged, but if it is only a theory that the body is within the area, then the correctness of the theory will conversely diminish in proportion as the area is searched. Thus, the same process in the first instance proves and in the second instance disproves the truth of the proposition.

- c. In the method of elimination by residues we have a process somewhat related to the argument, a priori and a posteriori, which having one term in a cause and effect relation seeks for the other, but in this case both cause and effect are assured and the effort is to discover whether any two particular ones belong together. Thus, where a group of causes are producing a group of effects, by eliminating one cause with its effect from the combination, it is evident that the remaining causes must be responsible for the remaining effects, both in kind and quantity. This may be continued with the same inference until but one cause and effect remain. This process has been used very successfully in scientific experiments of a high order. It often proves effective in arguing motives or agencies leading to crime.

Refutation: Like most other forms of argument, the value of the result is based not only upon correct process, but upon firm foundation. To make an alternative stand it is essential that it be conclusively shown to be an alternative and this is often difficult to show, hence, furnishes a salient point of attack. If nature does not reduce a situation to two or three possibilities only, it is seldom that any very definite surety as to the actual restriction is obtainable. Nevertheless, since some force must attach to any substraction from a number or quantity always assumed to be bounded somewhere, the best method of refutation is either to disprove some of the cases, or areas eliminated, or prove that the field of possibility is so immeasurably great that no practical significance attaches.

Argument by Interpretation.

Argument by interpretation is the process of proving the truth of a given proposition relative to a particular

thing through an examination, analysis and investigation of such thing. It is a proof of the embodiment of some fact in the concrete from which other inferences follow. In some instances it lays the foundation for an argument by authority. It is a method of finding rather than of organizing data.

Scope: The proof lies in the actual disclosure of the fact, let it be a meaning or a physical element, or a relation, through the aid of scientific means, as for example:

1. The microscopic examination of a drop of blood to reveal its human origin.
2. Chemical analysis to discover the presence of poison in an organ.
3. Experiments and tests in psychical time reaction to reveal the fact of previous experience in the mind.
4. Cross-examination of a witness to disclose the existence of mental weakness, incapacity, or dishonesty.

In actual life much of this form of argument is much less technical and also much less accurate, and as a result conclusions often are arrived at prematurely. Again, the scope of this argument includes proof of the existence of implied and express meanings in constitutions, codes, statutes, treatises, and in fact, in the general field of literature and expression. In some instances the most exacting technical rules are employed. Thus, for example, in the interpretation of legally constituted documents the law prescribes the method to be followed, to wit:

1. The occasion which gave rise to the expression.
2. The use of the term contemporaneous with the time of its authorship.
3. Subsequent interpretations of the same.
4. Relation of term or clause to other parts of the instrument.
5. Relation of the expression to the general purpose of the instrument.
6. Relation to other statutes and laws.
7. Relation to the support or destruction of the document.
8. Relation to the public versus private interests.

9. Relation to public morals and welfare.
10. Relation to the plane of its use, technical or otherwise.

In some instances the interpretation is limited to analysis of the instrument itself, but in others not particularly and exclusively so.

Value: The value of this argument varies considerably with circumstances for its method is often of such a laboratory type that it almost ceases to be an argument in the accepted sense and yet the very machinery of the process is often, when it is appreciated by the mind, what tends to raise the conviction of belief. If the method were better known the evidentiary force would be still greater, but in legal and scientific controversies among men capable of understanding the accuracy of the technique, the value is very high and perhaps nothing can be more effective and convincing. It is obvious, however, that the method, especially upon scientific questions, is not available for public oral disputation, but upon legal propositions it is not necessarily so limited for elaborate oral arguments are not uncommon upon great constitutional and legal questions.

Refutation: Refutation of this form of reasoning most generally attacks the absence of proper checks upon error and the variable element and sometimes by counter examination and analysis, as illustrated by the reversal of the verdict of Dr. Wiley concerning the effect of certain chemicals as preservatives, when the question was referred to a board of scientists from the great universities. It has been said that in this case the questions answered were not precisely the same in the two cases.

Argument from Cause and Effect.

The relation of cause and effect is one of the most fundamental known to thought. It ramifies in consecutive order the entire structure of the universe and binds all into one. In fact, the world as a product of creation by whatever method, represents the divergence from a First Cause into a countless multitude of secondary and succeeding causes together with their corresponding effects. This line of successive relationships bears some

analogy to the links of a chain, each being a necessary condition to the one following and depending upon the one preceding. Thus, the same thing is being related in thought backward or forward. The train of cause and effect is, therefore, purely relative.

Another significant and also mysterious fact is that this relation is not limited to the physical world, but operates with equal validity in the mental world and actually connects the two apparently unlike fields of existence together, that is, physical causes produce mental effects and vice versa. Constituting such a universal system of connection it naturally follows that reason finds it effective to pass by inference across its wires.

Value: The value of this relation as a basis of inference and, hence, argument lies in a peculiar double fact, to wit: necessary connection and the necessity for each object to be so connected. Thus, the mind, from its very nature, can not think of a cause with no result, but only as a cause for the precise reason that it does produce an effect and vice versa the mind can not think of an effect which has been uncaused.

In short, these ideas always exist in a necessary connection or train, hence, the argumentative lever in these cases is the effective one of absolute certainty. But not only must we think of these terms as necessary to each other, but we are also compelled to think that no object exists but as the effect of some cause or causes. So also when we reflect we are again pushed irresistibly to affirm that no object exists which does not in turn produce further effects so that we are bound to believe that each object, or fact, or thing not only is an effect, but also at the same time a cause. With all objects in the universe both related by necessity forward and backward it is evident that there is afforded a convincing ground for reasoning from one fact to another, either forward or backward. Thus, from its far reaching scope and its compelling factor of necessity this form of argument is of paramount service and value.

Characteristics: The relation of cause and effect as the basis for different forms of argument presents a num-

ber of phases which enter more or less into the strength of the reasoning and afford points of weakness for attack in refutation. Foremost among these are the following:

1. Necessary connection which, as has been stated, is peculiar to this relation and makes it especially binding. The idea at the foundation of this element is the belief that there is no such thing as spontaneous generation—things must have origin outside of themselves. To say that anything can produce itself is to assume or beg the question.
2. Sequential order or chronological succession which always marks this relation appears to import a certain process of emptying potential content into some further and more advanced stage of realization. The relation seems to imply a transference of some vitalizing energy from a given thing to a successive thing. In physical nature this is sometimes plainly manifest, but in mental life and especially from physical to mental existence the "nature of what passes" is wholly conjectural.
3. An equation between the terms of this relation is an extremely important phase since it implies that an effect never can and never does contain in express form any more than was originally and potentially and impliedly in the cause. That is to say the chain of cause and effect is merely an unfolding of what was already created to be unfolded and not a method of creation itself. To illustrate: The oak tree was potentially in the acorn; if not, the argument is that somewhere along the line the product might turn into a snake or anything else. Although this theory has been a debatable one, nevertheless in accepted thought it is assumed that a cause and its effect are certainly but modified forms of something at least which both possess in common. The one, therefore, for testing purposes becomes somewhat of a measure of the other.
4. Adaptability to combination and separation which means that causes often unite and produce a unified result or effect which is a joint product and will not respond to any single cause. This facility for combination makes the identification of an

effect, with its particular cause, very difficult at times. So also a combination may produce separate effects followed by the same chances of error. Strike with muscular energy, a blow upon an anvil, and one result is heat, another light, another sound, etc.

5. Expansion and contraction is merely the apparent dissemination of an effect over a larger area than that covered by the cause or the converging upon a narrower one. This fact may cause the mind to be deceived into losing trace of a cause or of underestimating its volume. It becomes very difficult, for example, to estimate the influence of an act upon a large concourse of people while, if localized upon one, its results may be registered with considerable vividness.
6. Active and suspended action involves the immediate expression or state of the active agent which registers itself in terms of cause and effect. Sometimes this agent seems to have left the cause and disappeared in the effects and no active force is longer possible. Thus, the cause or causes of the panic of '78 are matters only of history. But again, the cause may be a present active one maintaining a constant reproduction of its influence in some definite effect as, for example, the effect of the sun upon the earth. Or finally, a cause may not be historically extinct but smoldering potentially being temporarily suspended from an immediate lack of media through which to operate. To be strictly accurate, however, this is an instance of an object which may become a cause upon a given opportunity rather than a cause registered. The significance, however, of these differences in the field of fact is sometimes momentous in connecting supposed cause and effect. It is extremely easy to infer that since a thing exists which may be a cause, therefore it is a cause, and the fallacy is not always easily overthrown.

Form of Argument: From the very nature of the relation there results two general classes of arguments, since the reasoning must either operate in the field of fact precedent in time to the fact to be proved, or subsequent to it, thus dividing the sources of inferences into

two chronologically successive areas. All of those arguments arising out of the pre-existing facts are designated reasons from Antecedent Probability and the proving inference passes forward to establish its facts while all of those arguments arising in the subsequent territory are denominated in the widest sense, reasons from Sign and the proving inference passes backward to establish its fact.

1. ANTECEDENT PROBABILITY: Within the domain of antecedent probability, however, there arise at least five subclasses of arguments, to wit:

- a. Efficient physical causes leading to physical or mental effects.
- b. Efficient mental causes leading to physical or mental effects.
- c. Physical and mental inducements leading to physical and mental effects.
- d. Logical grounds leading to conclusions in the mind.
- e. Reverse subprocesses to establish mental and physical causes as a basis for the preceding four.

This reasoning from antecedent probably has also become designated as *A Priori*, that is, the process of proving the existence of a fact through the disclosure of a cause sufficient to produce the particular fact—an inference “from something before,” being the literal meaning of the Latin phrase. For example:

- a. I may prove that a flowing well is possible at a given spot by showing that it is located over a water basin fed from a water pressure upon a higher altitude.
- b. Or, I may prove that a certain man committed murder by showing that he had a motive of hatred, jealousy, money, etc., etc.
- c. Or, I may show that a blow upon the head has produced an aberration of irresponsible conduct.
- d. Or, I may show that an opinion of a man is biased by showing that he is possessed of a false impression.

The preceding arguments have involved what is known as an efficient cause in the world of

nature or an active force which is adequate to produce the effect and not merely able to make the mind believe that there is such a result. It is important to note that some facts have the power to produce the effect itself and because of this power to convince the mind to believe in the existence of a given result. Thus, the fact of falling rain would go to convince the mind that the ground was wet because it produced the fact, while exposure to the open sky would also tend to convince the mind of the same fact, but not because exposure to the open sky produces dampness, but rather because it conditionally accompanies it. Of this latter class there are two forms, to wit:

Inducement through Occasion, and
Inducement through Facilitation.

- a. Argument from occasion is negative in its character, yet opportunity is always a necessary condition for any efficient cause to operate, hence, if there be no occasion there can be no effect produced, so that the existence of an occasion, especially if fortuitous and exceptional, is a passive indication and inducement of action. Thus, where a bin of grain connects with a lower floor by a chute and a cut-off spigot, the turning of the spigot furnishes an occasion which gives rise to a strong inference of result. Hence, to prove a cause it is always a preliminary safeguard to establish the fact of an existing occasion.
- b. Argument from facilitation is somewhat more positive in character than mere negative opportunity, for the occasion once presented and the cause becoming operative, circumstances may now tremendously accelerate the moving cause. In the launching of a ship, when once the stays are removed and gravity causes movement, the speed is tremendously aided by a proper soaping of the track rails, and in mental life, when once an association has been made, a number of

repetitions greatly augment the case with which the one idea will cause its related ideas to arise.

The above form of argument is based wholly upon the fact that the mind may be induced to believe a thing through the presence or absence of some other thing not in any sense able to produce it. This arises from the association between objects, many of such associations having become well known facts of our experience and having produced an induction in our minds that this particular relation will always exist where these objects are present. Thus, using a former illustration, I may infer from thunder and lightning that the ground was wet, not because these phenomena produce dampness or facilitate it, though lightning might furnish occasion by presenting the opportunity for shock in the atmosphere, but particularly because they are so frequently associated together. It might be argued that this is deductive, and so it may be, for there is nothing to prevent deduction from being used as an argument in Antecedent Probability to prove that a certain effect exists. These forms of argument are frequently the work of each other and what the form of the argument is as a whole is not necessarily the same form employed to develop its essential parts.

We have just intimated that several arguments may be woven into the structure of larger arguments of a different sort. This is well illustrated in argument by Antecedent Probability where Induction, Deduction, or the reverse method of A Posteriori or perhaps any other method may be employed to set up the existence of a thing, which thing once demonstrated to exist, will prove a particular effect desired to be proved because this particular object is an established and known cause of the particular effect in question. So used, these processes are, however, merely subprocesses and auxiliaries to the main inference which will run forward from a proved cause to a therefore proved effect.

2. ARGUMENT FROM SIGN: Within the field bounded by that territory of fact occurring subsequent or contemporaneous with the fact to be proved are to be found at least two classes of argument from sign, to wit:
 - a. Logical grounds leading to conclusions in the mind.
 - b. Reverse subprocesses to establish physical and mental effects as a basis for the one above.

This form of reasoning consists of what is designated also as A Posteriori argument, which, literally interpreted, means merely an inference from that which has followed to something which has preceded, but it is usually applied only to the inferences backward from an effect to the truth of its cause.

But it also includes those cases where an inference may be gained from associated facts in such a way as to incur the belief that the fact preceding, which it is desired to establish, is true. Thus, we may argue the existence of death from certain odors which may be recognized, or from the rumor that Indian tracks are in the neighborhood, the first from an actual effect of death and the other from simply an attending circumstance.

Once more, as in the case of Antecedent Probability, there may be developed in the field of Sign other forms of subordinate reasoning for the purpose of establishing the presence of a given result, which once demonstrated, becomes the basis for an inference A Posteriori of the truth of a particular cause whose existence is primarily sought to be proved. Thus, it may be further argued that a death has occurred because birds of carrion are flying about, although this is not a direct result of death, it is an indirect effect through the agency of odors in the atmosphere.

Refutation: There are in connection with these various forms of the argument based upon cause and effect a number of possible errors which may be taken advantage of in refutation, to wit:

- a. Error of wrong cause or effect.

- b. No cause for a cause, or no effect for an effect.
 - c. An inadequate cause.
 - d. An excessive cause.
 - e. A suspended cause.
 - f. A composite of causes or effects.
 - g. A contributing cause.
 - h. A remote cause.
1. In the first two mentioned, the mistake usually occurs from taking the fact of immediate succession and sometimes in addition a long line of such propinquity as proof that a causal relation exists, whereas, perhaps, they are co-ordinate results of the same cause or co-ordinate causes of the same results or co-ordinate results. Thus, it was once argued that the removal of a tariff had caused a fall in the cost of quinine, overlooking the fact that a contemporaneous enlargement of the supply from a newly discovered source had been, no doubt, at least a contributing cause. It is difficult to ascertain, for example, what is the cause of the high cost of living because there are probably a large number of them.
 2. In cases where control over the factors are possible, a very neat method of determining which causes and effects are linked together has been furnished by Mr. Mill, as follows:
 - a. Method of agreement.
 - b. Method of difference.
 - c. Method of combined agreement and difference.

This experiment is based upon the doctrine of concomitant variations which holds that such a relation exists between a cause and its effect, that if the cause be varied and the variations measured the same, variations should and will follow in the effect even in the same degree as takes place in the cause. Proceeding upon this assumption and applying the method of elimination and residues, we may expect:

- a. If a group of antecedents or causes are changed a number of times so that A is the only thing in the group of causes which has remained constant, and if in the group of effects which follow after each change

- there is only one, X, which has appeared constant in each one of them, then you may infer that A is the cause of X. Or,
- b. If a group of antecedents contain A and a group of effects following contain X, and A be removed from the first group which results in X also disappearing from the second, then you may infer that A is the cause of X. Or,
 - c. After the phenomenon of A and X remaining constant in all of the changes of the first method, you follow by removing A in each case and when followed in each case by the disappearance of X, you have a double assurance that A is the cause of X.
 - d. A fourth method might be added, namely, to consecutively increase or diminish A and observe whether X responds to the changing cause in a proportionate way; if so, this is convincing proof of the supposed relation.
3. Refutation may also secure a foothold in testing the characteristic of equality between the cause and the effect. A great disparity between the two in magnitude is a very serious indication of error and even a small difference is sufficient to arouse suspicion. For instance, to argue that a mere change in presidents is sufficient to account for a financial panic is such an inference, and even to hold that poverty is a cause of murder, challenges a close investigation for other causes. Or to argue that a passion for travel causes a tenant to move more frequently from one part of the town to another would be the reverse error of excessive cause.
 4. Not infrequently a supposed single cause may turn out upon analysis to be only one of several forces all tending to the same end and when this is shown the strength of the argument is considerably lessened. Again, a cause, when established, may sometimes be most effectively shown to be suspended and, hence, not responsible for the fact in question.
 5. Finally, the question of tracing a cause backward through successive changes and over a consider-

able time is a difficult one fraught with grave dangers of overlooking an intervening cause. In legal practice some rules are laid down, principal of which are: First, that a cause must be proximate, and second, that a contributory cause by the plaintiff is fatal to a recovery of damages.

- a. By proximate cause is meant not one necessarily occurring immediately preceding the effect, but which can be directly traced to that effect. The case of the squid which was automatically tossed from one person to another and finally lodged in the eye of a person, doing damage, was held to be a proximate cause in the hands of the first person.
- b. A contributing cause is not held to prevent an action for damages if it can be shown that the effect would have been the same though no contributory negligence existed. Thus, death resulting from a tortuous act will be ascribed to that act though there was negligence in caring for the wound thereafter.

It can readily be seen that refutation would consist in combatting these conditions from whichever view they are presented.

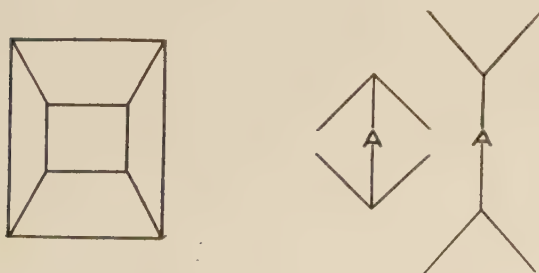
Argument by Intuition.

This is a very old form of argument based upon the idea that the senses report things as they are when directly presented to them and that the mind is equipped from within with certain powers of insight and rules of truth. Much philosophical discussion has taken place relative to the correctness of these views and whatever truth they contain, of which no doubt there is considerable with proper limitations, yet the fact remains that in practical life a verdict returned by direct personal experience is almost conclusive in its convincing force over that mind. The adage that "seeing is believing" is proof of its general power. For this reason it is a very effec-

tive instrument in argumentation. As a formal definition, Argument by Intuition is "the process of proving a proposition by an appeal directly to the senses or understanding of the person."

Kinds: There may easily be distinguished two widely different kinds, to wit:

- a. One an appeal to the senses of seeing, feeling, hearing, tasting and smelling.
 - b. The other an appeal to the pure intellect.
1. The argument, through sensation, is the most vivid of all evidentiary processes and though there seems to be no conscious inference at work, still there is no doubt that its rapidity of action and the vividness of the sensation both tend to render it less obvious. To many people the senses are worthy of implicit trust, but to the investigator their reliability is often questioned. To make matters worse the instruments which are so serviceable in everyday life in uncritical experience are hard to be repudiated in particular instances requiring exactitude. To experience and to prove by this method itself its own susceptibility to error let the observer say whether the following object is a flat surface, the inside of a box or the outside of a box. As to whether the lines are equal



2. Just as an appeal to the sensations is the most vivid form of evidence, so also the direct appeal to the pure intellectual, often called intuition, is the most indisputable. Out of this process have been formulated the truisms called axioms, among which are the following:

- a. Things equal to the same thing are equal to each other.
- b. The whole is equal to the sum of its parts.
- c. What is true of the whole is true of its parts.
- d. A thing must either be or not be.
- e. Whatever is, is, that is, reality is essential to all objects.
- f. A thing can not both be and not be.
- g. A straight line is the shortest distance between two points.
- h. Parallel lines never meet.

No exact limit as to number can probably ever be ascertained relative to these forms since they merge into the categories of substance, attribute, time, space, number, causation, quantity, quality and many others, besides the fact that a long uninterrupted experience has produced many conclusions which are now so manifestly true as to be denominated truisms. All of these, however, in argumentation are intelligible under the same method of direct appeal. In general, anything which the general mind will accept without hesitation and question is material for this method.

Refutation: Naturally one would think an argument of this sort would preclude any attempt even at refutation, but the reverse is quite true. Some of these conclusions are in fact spurious, for custom and age have a way of casting a peculiar halo of truth about these things and sometimes this may be rudely broken. Again some of these rules or principles are not applicable under all situations nor sometimes interpreted correctly, for example: That the whole is equal to the sum of all its parts, does not mean that the whole is exactly in every way equivalent to the sum of its parts, for this is fallacious. A human being is not equivalent to the sum of his parts—in fact, he is much more—the sum plus life and organization.

Argument A Fortiori.

The argument A Fortiori is that form of reasoning which appeals to the strength of a safety margin in making an inference. The foundation of the argument rests

upon the psychological effect of surplus or abundance as an evidentiary force. To prove a statement barely may be proof, but it is proof sometimes linked with a doubt or a twinge of logical regret that the issue could not have been substantiated by a safer margin. In responding to this feeling and desire for double assurance the reasoner may point out that if the mind accepts the truth of a given proposition for particular reasons so much the more so must it then in the case of this proposition which contains not only those grounds, but even in a much greater degree.

Basis: It is evident that this form of inference employs admitted matter for a starting point. The receiving mind is assumed to have accepted the truth of a previous proposition. This fact presupposes an analogy between the proposition thus admitted and the one to be proved. To be sure, it may be necessary to establish the existence of such analogy, but it is usually done not so much by proving an analogy at all as to emphasize that it is more than an analogy alone. The fact of analogy is established in the very process of setting forth the excess margin. The force of the method lies in the position that having already admitted the principle in one case the mind is compelled, therefore, to admit its application in a case still more in point and expressive of the same truth. It is said to have sprung from the axiom, "What is greater than a greater is greater than the thing itself." This form of reasoning has always been extensively used in forensic oratory and appeals to the simplest mind strongly. The Bible affords numerous illustrations of its effectiveness, to wit:

"Wherefore, if God so clothes the grass, which today is and tomorrow is cast into the oven, shall he not much more clothe you, O ye of little faith!"

Refutation: To rebut this argument it becomes necessary either to destroy the supposed analogy between the two cases, or to disprove the admission of truth in the first proposition, or to show that there really exists no surplusage of grounds in the proposed proposition.

Argument from Congruity and Incongruity.

There exists among all intelligent human beings a body of personal experience which has become reduced to an orderly system and the fitness of whose parts has become so well grounded that any serious deviation from such established order is at once a signal of falsity. The background of this order is based upon the two most fundamental relations of space and time. All experience seems to organize upon and through these two ideas. Psychology shows that the experience of any one individual will organize about one particular relation and the mind will always thereafter think in terms of that idea as a background. For example, most people are *visualizers*, that is, their thought will tend to image most vividly in terms of space relation or what they can see. Others have been known to imagine more vividly in terms of sound, still others in motor sensations. Animals no doubt are often governed by space relations, the mole by tactual sense relations. But human kind not only perceives objects present in space, but also fits them into a system of time relations running both forward and backward.

Besides these fields of space and time, each having an order and system of its own become interrelated together in an orderly way. Thus, the elements of change will affect a given place in space so that a particular area or spot will have a history of development from one condition into another or a retrogression. In short, all history of the face of the globe gives a description of places or space in time succession. Then again, the spectacle of objects moving from one spot to another in space will gradually develop a certain relation of time to distance in space and thus the number of miles of space which can be covered by a particular animal, or man, or with a

particular means of transportation within a given time, has become a well established estimation.

In addition to these relations the ideas of quantity and quality also become interrelated. The relation of quantity to the length of time in growth becomes measured in countless ways. A child will grow to weigh approximately one hundred and fifty pounds in twenty years, while an elephant will start with as much bulk and grow to a weight of tons in the same time. It would be needless to multiply examples. Quality will likewise become related to place, to time, to quantity, etc. All of these relations and many more are, however, worked out in human experience in terms of approximately exact ratios and proportions. It is evident, therefore, that the law which demands congruity among these things will furnish a splendid test of error and falsehood. It is recorded that Abraham Lincoln in a case in which a witness had testified to the presence of moonlight which became a deciding issue refuted the testimony completely by referring to the almanac which recorded that the date in question occurred in the dark of the moon.

Value: The value of any particular argument from congruity will depend upon two things, that is, the obviousness of the incongruity and the degree of deviation which may pass from merely a slight inconsistency to a contradiction of all possibility. Suppose that it be argued that a given pistol was the weapon used in committing a murder. It is refuted by showing that no shells in the weapon were exploded—the inconsistency is not conclusive. But suppose that the ball extracted from the wound is so large that it can not, hence could not have been inserted into the barrel—the conclusion is inevitable. To prove an alibi is a standard proof of this kind. Moreover, the value of this method is greater in proving a fallacy than in positive proof, for while the lack of consistency is strong evidence of error, the reverse situation, to wit, the presence of consistency, does not equally well

prove the presence of a truth. Thus, it was long argued that because the idea of God seemed to demand or at least was not incompatible with certain attributes, therefore they belonged to the Deity. This is the result of a curious inference that whatever is necessary to thought is likewise and therefore necessary to existence. This conclusion does not follow unless the conditions of thought and existence are the same.

Kinds: 1. The incongruities arising out of space relations may be divided into those which contradict the laws of space itself and those which contradict a proper disposition within space:

- a. The laws of space prescribe that space is inelastic and fixed; that whatever part of space is actually occupied excludes other identical occupation, that is, two bodies can not exist in the same place at the same time; that space experience or perception is acquired and varies somewhat in different individuals, being naturally most defective in infancy. The child reaches for the moon. Most people are very incorrect in their perception of distances.
- b. Many incongruities occur in the established disposition of objects in space. For instance, vitally related to the force of the sun in one direction and the force of gravity in the other, objects have an upper and lower adjustment to each other which is extremely important. Thus, to argue that land is subject to damage from overflow from a particular source would hardly stand in the face of data showing it to be on a higher sea level. Again, objects have a very definite ordering in a lateral sense since for governmental and legal purposes territorial areas are set apart and subject to different control and different conditions. Thus, to whom belonged the man who was born in England of German parents and was captured by an American vessel on board a Dutch merchantman sailing under the Spanish colors? The case of *Dred Scott* raised a question of territorial incongruity.

2. Incongruities growing out of time relation fall into two divisions: Those which contradict the laws of time itself, and those which are inharmonious with the contents of time:
 - a. Time is best expressed as a longitudinal order or consecutive order into which objects may be related but may also have a lateral and simultaneous significance. This order, as in space, is fixed and is measured into varying systems of units. Thus, when once a thing is located in time it at once takes on definite fixed relations to other objects, and hence, for an object to lose its order of time in the mind is a sure indication of uncertainty and falsity with reference to assertions thereto. Since all people maintain as nearly as possible the proper order of their experience with objects, an untruthful record by one person is almost certain to be exposed by the testimony of others to the contrary, or by its own lack of consistency with other dates.
 - b. But time has another element more subject to incongruity when false than that of a fixed order, and that is the content of each successive unit. By this is meant the fact that certain dates and periods in the year as well as in history generally become associated with the coloring of life conditions at that moment. Night and day are not only time phrases, but mean certain prevailing conditions of light, temperature, activity of mankind, etc. So is it with the seasons of the year, so also with certain holidays and, in fact, there is scarcely a location in time which does not have its concomitant conditions. It is with these that the false statement is likely to break and sometimes with abrupt vividness. A witness testifies to having watered his stock in a certain stream, but statistics of the county show that it is always dry at that period of the year. Or a witness testifies to seeing an object when he crossed a certain divide, but if he did it is shown that

he did so in the night time and during dense darkness.

3. Again, incongruities often occur in connection with cross relations between time and space, and these are more generally observable in instances, to wit: In movement of objects across space and in the evolutions or development of places.
 - a. The common place phenomenon of moving objects has firmly established in our conscious order of things a ratio between distance traveled and time consumed. This ratio varies with each method of locomotion and under the varying conditions of roads, vehicles, travelers, etc. For this established relation to be ruptured too widely in the testimony of witnesses or records is simply to prove beyond disputation an error. This is favorite material in which lawyers endeavor to entangle the story of witnesses. To make a narrative of movement which is untrue remain harmonized with spatial requisites is extremely difficult.
 - b. So also time measurements and development grow indissolubly connected and embedded in the very changes of aspect and conditions of any given place. Some of these become historic and few localities where men live but in time acquire a traditionary history of successive changes. These changes inevitably touch and affect the acts of men so that they become checking up materials in the ascertainment of truths associated with them.
4. Naturally enough quantity and bulk become cross related with space and time.
 - a. In the measurement of quantity by weight there can be no escape from an incidental ratio to the space occupied and the ordinary individual soon acquires as a part of his working experience these concepts so that he learns to estimate with considerable accuracy the weight through the amount of space occupied. Once more this varies with each kind of an object so that the

field becomes highly complex. Not only this, but quantity is measured in many instances directly by a number of space units and these become fixed in men's experience. All of these become a part of the general practical education of the individual. The result is that any considerable deviation from these ratios will excite a distrust of truth and prove an excellent form of evidence.

- b. Observation soon teaches the mind that in growing objects either by accretion from without as a sand bar or a stone, or as a living body, that quantity is a measure of time and the very period necessary to produce in time a given bulk is a well known item of experience. Every animal has its normal size related to a particular duration of growth as has also every plant, vine and tree, so that a break in this expected and familiar order will at once suggest error and falsehood.
5. It is also a fact of nature that quality is related to quantity and time.
- a. It has frequently been scientifically pointed out that at least in connection with the process of growth and development quantity and quality tend to bear a somewhat conditionalizing relation, the one to the other, that is, too much bulk deters somewhat qualitative structure and over-organization appears to prevent great bulk. It is a common inference that a very large vegetable is probably of poor quality and generally corroborated in fact. It is the rule that very valuable objects are usually not of great quantity.
 - b. Generally, the element of quality is a matter of development and therefore age in many ways gives assurance of maturity. Newness in objects is almost synonymous with rawness and immaturity, and while, no doubt, many exceptions exist, yet the rule is so well established that an obvious

contradiction to the principle is a questionable circumstance, at least.

Refutation: While the argument from the relation of congruity and incongruity comes to the surface in so many ways and with such endless variation that no specific rules can be formulated with reference to their refutation, still it may be said that formulated statistics, in so far as they come within the scope of judicial notice and the laws of evidence, constitute the best means of rebuttal. Some distinctions which are now and then overlooked may sometimes prove effective, to wit: that parts coexist while qualities not only coexist but usually coincide as well; that immediate perception is often colored by an element of inference; that repeated experience from hearsay tends to eventually become identified with the much used expression; that sight, sound and odor vary according to the clearness of the atmosphere, etc. All of which goes to show that the various relations are subject not only to external conditions, but also to subjective states of body and mind as well. Thus, testimony is often destroyed by the exposure of some defect of the witness either in his powers of perception or reason. The only way to overcome the incongruities of testimony is either to show that the inconsistency is more apparent than real or that the inconsistency, if true, does not affect the substance of the issue.

Argument from Appeal.

All genuine argument is based upon logical inference, but it is often possible to secure the acceptance of a proposition not upon its logical status so much as upon the psychological mood aroused in connection with the presentation of its claims. It may not be an outright appeal to the emotions in their pure form, but none the less an appeal to the sensibilities which have become the undertone of the personal life. Such form of argument, if such it may inaccurately be called, constitutes an appeal to the will to believe, rather than to the reason to believe. It is charged with the energy of action rather than with the inhibition of reflection.

Kinds: This method of persuasion is exceedingly general in the form it may assume and has been designated in technical phraseology from several different stand-points. These several species are in no sense exclusive nor arrived at from any single basis. Among them we have:

- a. Argument from innuendo—sarcasm. (Brutus is an honorable man.)
 - b. Argument ad populum—appealing to a mob. (Everybody thinks so and so.)
 - c. Argument ad hominem—skin the attorney on opposite side.
 - d. Argument ad iudicium—common sense.
 - e. Argument ad ignorantum—false statement.
 - f. Argument ad invidiam—passions.
 - g. Argument ad verecundiam—modesty.
 - h. Argument ex concessio—changing mind.
1. Irony and sarcasm, like all caustic weapons of discussion, are as dangerous as they are highly effective under proper circumstances. Few people are temperamentally fitted to use this method of persuasion or logical whip method without its attendant disadvantages. If the innuendo or indirect statement carries no personal rancor or bitterness with it there is sometimes great rhetorical vigor secured, but if the end be gained at the cost of a vindictive reaction there can be little said in its favor. Shakespeare has some telling examples of this method in the arraignment of Brutus. While the back-handed or indirect form of innuendo need not necessarily convey irony, sarcasm and invective, yet it is commonly resorted to in which to express such material.³

³ "Somewhat by innuendo it is argued that the relations of Miss C. to Dr. B. during the lifetime of his first wife were meretricious. The argument travels on the theory that if such wanton and irregular status was established at that time it is presumed to continue and the burden shifts to plaintiff to show its sinister character altered. But the case need not ride off here on such narrow and sour theory. Such inferential claim of sexual looseness between them, during the lifetime of the first wife, takes form and color from suspicion rather than proof. Plaintiff said their then relations were 'platonic.' Assuming for appellate purposes that she not only knew, but that she was a competent judge (if not an actual devotee at the altar) of the rather cold doctrine of Plato, we will take her word for it, as the jury might have done, and let it go at that."

2. The address, "ad populum," consists in appealing to the people as a whole, not only directing one's statement to the sentiments and impulses and habits of people at large, but in, for, and by the people en masse, for it is well known that a social unity of interest and action may be stimulated by arousing the same on behalf of such general welfare. This is distinctly an appeal to the herding instinct, the social and aggregate impulse and habit as distinguished from an individual personal supplication. The harrangue to the mob is a common illustration of an argument ad populum. This phrase may also be construed to mean the support of a proposition by calling attention to the attitude of public opinion upon the question. So interpreted it becomes a peculiar species of argument from the authority of numbers.
3. The reference "ad hominem" is often an illogical digression of the attack from that of the opponent's case to the character of the opponent or his advocate. It is obvious upon a moment's thought that good logic is not impaired by the personal character of its author, however incongruous the two may seem, except in the minds of an uncritical audience, nor is poor logic made better because it is espoused by an eminent logician. There is no necessary logical connection between living an immoral life, for example, and giving good advice against it. In short, the final test of logical accuracy is a logical ground and not a psychological one. The error seems to spring out of another fact, to wit: that a bad character is not often associated with a good logician. But there is a wide difference between a good logician and the logical correctness of the particular proposition in issue since a poor reasoner sometimes may produce the soundest kind of an argument. The jocular so reported note book of Lincoln, in which there is a comment, "No case, skin the attorney," is an illustration of this method of avoiding the real issue. That it succeeds and is frequently used is in no way

complimentary to the legal profession. It should never be resorted to in such a manner, for it is based upon fraud, and inevitably ends in inexcusable abuse.⁴

4. The argument "ad judicum" is not objectionable when the appeal is in support of a truth which ought to be fully grasped by uncritical thought, but when the appeal is made to array the judgment of uncritical sense against the call for a close investigation, it is wholly censurable. The multitude, it is fair to say, views with suspicion any attempt to rob what is generally termed "common sense" of its virtue, for while the mass feels its educational limitations, it nevertheless prides itself upon the possession of that natural endowment of "common sense" which has at least acquired a reputation for saneness and safety. It is this feeling which is appealed to in the argument ad judicum, sometimes with excellent results where hesitancy and investigation are unwarranted, but sometimes with equal mischief where it tends to forestall a vital and much needed scientific investigation.
5. The appeal, "ad ignorantum," or, in plain terms, to the ignorance of the hearer, is reprehensible on its face. No self-respecting advocate would ever resort to such a plea for an instant and yet the demagogue employs it without scruple. It is a common instrument of propaganda during political campaigns and consists in the argumentative use of falsehood as a basis of inference. In many instances the inferences themselves are correct enough and cast over the whole a semblance of truth, but the premises are deliberate falsehoods. Since it is not always possible to detect the fallacy in a plain statement of fact given as the truth, there is much more credibility and successful deception possible in the process than might be at first supposed. For example,

⁴ But the argument ad hominem may also be of a somewhat different character and is often very effective. Charles Read's "Put Yourself in His Place" is a powerful argument of this general class, and another illustration is found in the opinion of Judge Lamm, in *Bishop v. Brittain Inv. Co.*, 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912 A, 868.

"Peace at any price"; no such doctrine was ever claimed by anyone.

- 6-7. Prominent in use among these questionable practices are those which resort to the direct arousal of feeling upon the issue. Some of the sensibilities are inhibitive in their effect while others are aggressive in tendency. Neither are stimulated to enforce an action already decided upon, but to supplant all reason in making a choice. The effort is directed to the expulsion of the reasoning process and the production of action directly from impulse, instinct or habit. There may be said to be three distinct effects which may result from this method, to wit:
- a. Mental confusion in which the distinctness of the issue or issues is lost and the mind seeks refuge in some minor detail.
 - b. When modesty or self-restraint is quickened and becomes an obstacle to logical action. This process is termed "*ad verecundiam*." The appeal to fair play is sometimes but an adroit foil to prevent logical fairness. Extreme sensitiveness to achieve a result not infrequently becomes an impediment in its own path. It is a common observation that the most subtle form of flattery is to inform another that he can not be flattered.
 - c. When combative feelings are aroused, of whatever sort, from jealousy and hatred to the milder forms of established prejudices or bias. This has been termed "*ad invidiam*." While the range of these sensibilities appealed to usually embodies many of the destructive and unworthy emotions, yet it also includes some of the very virtuous feelings such as loyalty, love and patriotism. They, too, may be degraded to the service of the demagogue.
8. Finally we have the phrase, "*ex concessio*", used in connection with argumentation to signify a method of reasoning based upon some admission made by the opposition. This, in fact, is at least presumed to some extent in all debatable questions, for it is necessary to begin somewhere with

a common ground upon which both disputants can stand and agree. However, in this particular method, the fact is emphasized and tends to strengthen the argument based thereon, not so much upon logical grounds which are impersonal, but upon the psychological and personal necessity for the opponent to remain consistent with himself. It is a method of compelling a man to disprove himself by his own assertions. It really amounts to a personal refutation rather than a logical one and for this reason may be classified with the questionable subterfuges.

Refutation: Although it might be presumed that trickery and fraud, in open discussion, would prove their own undoing, yet the results are far from supporting the supposition. On the contrary, these methods in the hands of a skillful demagogue never cease to cause wonder and consternation. And so, also, they are, strange to say, hard to refute. To meet the feelings thus aroused by logical exposure seldom results in success. A mind deceived is not willing, usually on logical grounds, to admit the fact and frequently resents the suggestion. The best refutation for one feeling is another one appealing in the opposite direction and carrying with it no logical repudiation of the other. Thus, one feeling should be countered with another feeling and the whole effect be one of cancellation rather than one of refutation.

CHAPTER IV.

ESTIMATING REPOSITORIES OF LAW.

The Practical Meaning of Law.

In the actual practice of the profession for purposes of argumentation law has a practical meaning only. It must have found expression in some repository. So long as a rule of conduct, a custom or a concept of morality, justice, or right, has found no lodgment in a definitely recognized depositum of law, it can not be said to be law in a legal sense, however meritorious it may be within itself or valuable to society. For moral law and legal law are distinct things, although the latter may express or endeavor to express the former. Law is not legal because it is identical with moral law, but because it has been made legal by a politically authorized process. Moral law is a part of the order of the world as a complete system, but legal law is a product of man's creation. The former constitutes the ideal standard of what the latter should express and in fact attempts to express, but legal law has no occasion to cover all of moral law, on the one hand, and does have need on the other hand to cover a field of relations which may be said to be without ethical content—a realm of unmoral relations. An interesting example of the difference between legal and moral law, and the effort of moral law to legalize itself because it is moral, is revealed when the so-called Higher Law is invoked by an advocate to save a client when all else has failed. Law must therefore be legalized in a recognized depositum.

Then, too, law as applied by the practitioner, must have the status of being "in force", alive, at the time of applica-

tion. That which was once law may have become obsolete from long disuse, or repealed by later enactments. If so, it has merely a philosophical or historical value.

Relative to a particular territory or jurisdiction, law must be "in fori", that is, law is ultimate authority within its own jurisdiction only, while outside of this it has no greater than persuasive influence. — Hence as a result of these considerations, law in the sense used in legal application is not a theory of jurisprudence, nor ethical principles, nor maxims of justice in historical form, but consists on the contrary of the rules in force at the time of application over any particular jurisdiction and receiving the support and enforcement of the sovereign government.

Different Forms of Legal Repositories.

The same authority or agency which makes a rule of action law, in so doing finds it necessary to embody the result in some tangible form. Rome engraved her laws upon tables of stone, and later the praetors found it convenient to formulate their decisions into platforms of principles and to give them public expression. Still later the great Corpus Juris was created as the fundamental law. Codifications of maritime law followed in quick succession. Italy, Spain, France, England and Germany all became active in the reduction of law to system and in the embodiment of the same in written form. Accordingly, there grew up two broadly distinguished forms of repository, to wit; law which is expressed in statutes, and law which is embodied in the decisions of legal tribunals. The former originating directly in legislative bodies assumes a number of species. These in their order of importance are respectively, constitutions, treaties and statutes proper. They are generally said to contain the "written law" in contrast to the "unwritten law", since it is law which finds its first expression in language

framed for that express purpose. For this reason it follows that much emphasis is placed upon the exact meaning of the terms and phraseology thus employed. Nevertheless, much difficulty has arisen and no doubt will always arise over the question of proper interpretation. At this point the practitioner becomes a factor in the process, and while a goodly number of rules have been evolved to render this interpretation more certain, yet the trouble can never be eliminated so long as legal terms are not uniformly defined and law-making bodies continue their unscientific methods of legislation. As matters now stand, no court can pass with any legal effect upon the meaning and soundness of principles before they are enacted into law, and the Supreme Court of the United States has refused to do so.¹ Correct as this position undoubtedly is, nevertheless the result follows that unless a particular statute has been interpreted by a court during the process of actual litigation, the practitioner is left to estimate the effect, meaning and value of such statute for his purpose unaided. Obviously, the more simple the subject-matter and the clearer the language of the law, the more effectively it may be applied, while the more complicated its contents and confused its expression, the more difficult to utilize conclusively.

On the other hand, law which becomes embodied in judicial decisions also falls into different classes from the fact that it originates in more than one way. As already mentioned, this body of law is denominated "the unwritten law", although the phrase is somewhat misleading, for it does not imply that it is a form of law existing independent of any legalized repository, but rather that the principle once existed in the form of custom before it became law. Nor is even this true of all law embodied in judicial decisions, for there is extant a considerable body of court-made

¹ Thayer's Cases on Constitutional Law, 175, 176n, 183n; Thayer's Legal Essays, 42n, 54n.

law not arising from a recognition and formulation of custom, but the direct result of exigency and expediency. Thus although the courts consistently refuse to render prelegislative or prelitigated decisions or opinions, yet when a set of facts comes regularly before them for adjudication, they are officially bound to decide the case even though no rule of law is found applicable and in such an exigency the court will sometimes lay down an appropriate principle.

In an instance of this kind the case is sometimes decided accompanied with the injunction that it shall not be construed to establish a precedent, although it is difficult to prevent its further application. However, in addition to these cases courts not only possess the right, but are encouraged to render decisions which are in accord and harmony with the progressive readjustments of society. The exercise of this function results in a species of court legislation which is not only unavoidable but highly beneficial to the country. For example, there is a steadily growing tendency of the courts to hold the individual members of a corporation personally liable for its acts and to prevent them from escaping responsibility behind a purely abstract entity. Moreover, the courts promulgate and publish from time to time rules governing their own administration, and these have the binding force of law. All these together constitute what is described as the "unwritten law", but which nevertheless becomes embodied in the decisions of the courts, and without which embodiment would not be entitled to the authority of law.

In addition to these species there has gradually grown up in the process of interpreting and construing law a considerable body of principles and rules governing this process and these also assume the force of law, so that there are at least four sources of court-made law. Moreover, besides these law-making forces there is an anomalous species of law formation of a negative type arising from the influence of public opinion on the one hand, and professional disap-

proval on the other. Unless a law meets with a fair measure of public approval it tends to become a "dead letter" in legal practice, or when a law is or becomes distasteful to the legal profession it suffers a decadence in use with the result that it virtually, if not actually, assumes the status of the obsolete.

Finally, there is an illegitimate so-called "Higher Law" which now and then rises into prominence in criminal practice and no doubt determines the issue in some cases. This amounts merely to a substitution of the moral law for the legal, and is the result of the constant pressure of moral ideals to find expression in the legalized code. Technically such an appeal is without warrant and illegal, but in actual practice it sometimes operates with the force of unwritten law.

All Law Must be Interpreted.²

Law is not self-interpreting. No law exists, either written or unwritten, which does not require to be interpreted in order that it may be properly applied and administered.

Obviously, law must be more or less general in expression, and no case can be correctly adjudicated without compelling the court to determine by interpretation whether the facts alleged and introduced bring the particular subject-matter within the provision of the law. Inevitably it becomes the function of the lawyer to assist the court in making this estimation. Recent enactments naturally present greater difficulties than do old and established principles of the common law, but even these need constant review to keep them abreast of the continual march of advancement and change. Nor is this view opposed to the words of Vattel, that "it is not allowable to interpret what has no need of interpreta-

² Vattel's Law of Nations, bk. 2, ch. 17, § 263. See also *Horton v. Mobile*, 43 Ala. 598, 604; *Ayers v. Trego*, 37 Kan. 245, 15 Pac. 229; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Seldon v. Hall*, 21 Mo. App. 452; *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073.

tion". The real significance of which is, that the interpretation should not become so hypercritical as to warp a passage out of its obvious sense. To which all must agree. A simple error of grammar or inelegancy or inaptitude of expression should not be sufficient to divert an otherwise clear expression of its intent. But it is the very office of the rules of interpretation to prevent such a proceeding. Assuming that legal language should be rationally understood, it is the function of interpretation to supply a sound set of rules to aid in facilitating such a process.

The interpretation of both written and unwritten law follows substantially the same principles, and the former should always be construed in relation to the latter. Because the early English statutes were briefer and more general than later statutes in both England and America, thus justifying a considerable amount of bending, restraining and enlarging of meanings, which led to abuses of interpretation, the reactive tendency has been to interpret too little rather than too much in more recent times. Presuming that the makers of statutes express what they mean, they are thus entitled to have their real meaning, if it can be ascertained, carried out, although the court may entertain personal opinion at variance with such intent. On this point Lord Mansfield said: "Whatever doubts I may have in my own breast with respect to the policy and expediency of this law, yet as long as it continues in force I am bound to see it executed according to its meaning."³

The importance of interpretation in the practical administration of law is well expressed in the following words from Cooley's *Constitutional Limitations*,⁴ where he says: "The deficiencies of human language are such that, if written instruments were always prepared carefully by persons skilled in the use of words, we should still expect to find

³ *Pray v. Edie*, 1 T. R. 313, 314.

⁴ Cooley's *Const. Lim.* (7th ed.) p. 70.

their meaning often drawn in question, or at least to meet with difficulties in their practical application. But when draughtsmen are careless or incompetent, these difficulties are greatly increased; and they multiply rapidly when the instruments are to be applied, not only for the subjects directly within the contemplation of those who framed them, but also in a great variety of new circumstances which could not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish. Moreover, the different points of view from which different individuals regard these instruments incline them to different views of the instruments themselves. All these circumstances tend to give to the subjects of interpretation and construction great prominence in the practical administration of the law and to suggest questions which often are of no little difficulty."

Fundamentals Preliminary to Interpretation.

The Most Generic Principle of Law.—Without doubt the most fundamental principle in the interpretation of law is the saying "that in the absence of precedent or statute reason and justice is the sole spirit of the law". Even the rule most general in determining written matter, that the intent shall govern, may have to yield to the still higher law, that it must not be without reason and justice, that is, law will not give standing to folly and injustice.

The General Quality of Law.—It is a most important part of the policy of every civilized state that the law should not encourage things which are inherently vicious, demoralizing or antagonistic to the general principles of morality which form the basis of civilized society; nor will laws generally be upheld which violate contracts, vested rights or which defeat due process of law, which are against pub-

lic policy or contravene the fundamental rights secured to the people under the constitution.

Order of Supremacy of the Written Law.—When written law covering a question exists, it is essential to know law in the order of its supremacy. Article VI, sec. 2, of the United States Constitution, says: "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby anything in the constitution or laws of any state to the contrary notwithstanding." It is the usual practice for the Supreme Court of the United States to follow the decisions of the state Supreme Courts on decisions affecting state constitutions only. The Supreme Court of each state is supreme authority over its own jurisdiction.

No federal statute or treaty is lawful which contravenes the provisions of the United States Constitution, but as between treaties and Federal Statutes the supremacy depends upon conditions. Generally a treaty being a semi-civil, semi-political contract takes precedence over a Federal Statute, yet the judicial doctrine prevails that the courts can not declare such a statute void on the ground of motive when it is a war measure even though it over-rides a treaty.

A thorough knowledge of federal jurisdiction is a necessary adjunct to every lawyer in connection with determining priority between federal and state laws in questions of concurrent jurisdiction. In such cases the federal courts sometimes follow and sometimes ignore the ruling of the state. The distinction between supremacy of courts and supremacy of laws should not be overlooked.

But the same reasons which require that the final decisions upon all questions of national jurisdiction should be left to the national courts, will also hold the national courts bound to respect the decisions of the state courts upon all questions

arising under a state constitution and laws where nothing is involved of national authority or of right under the constitutional laws or treaties of the United States; and to accept the state decisions as correct, and to follow them whenever the same questions arise in the national courts.⁵

The state constitution is the primary law of each state. In states where codes have been adopted the session laws appearing annually take precedence over code provisions when a conflict ensues. It thus becomes a measure of prudence to carefully note the retroactive effect of these laws immediately upon their creation. The latest law is always presumed to be the ranking law.

The Place of the Common Law.—The Common Law, as used in our practice, is probably a mixture of customs indigenous to the soil of England and Civil Law transferred at an early period beginning when the Romans invaded Britain. This so-called law of custom became embodied in precedents which reduced the principle to stated and written form in the nature of court opinions and decisions, and these were the doctrines which were transplanted to America with the Colonists, and which have become an integral part of our law ever since.

Over questions not falling within the written law which takes precedence over all unwritten law, it is necessary to ascertain whether the common law applicable, is national or local in its scope, since each state possesses the power to adopt or create whatever laws it chooses for its own government so long as these do not conflict with the Federal Constitution, Statutes and Treaties.

The extent to which the common law has become adopted into our federal system should be carefully noted. The

⁵ *Beauregard v. New Orleans*, 18 How. (U. S.) 497, 502, 15 L. ed. 469; *Green v. Neal*, 6 Pet. (U. S.) 291, 298, 8 L. ed. 402; *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492, 524, 7 L. ed. 496; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152, 159, 6 L. ed. 289.

question arose in *United States v. Worrall*,⁶ and "although the court was divided on jurisdiction, it adjudged a punishment. It seems well settled that jurisdiction must be conferred by the constitution or the law, but as to whether rights are to be decided according to the common law and contrary or irrespective to the decisions of the state courts, it may be observed that the federal courts have done so."

In view of the colonial use of the common law before the establishment of the Union, every statute enacted by a state legislature is construed and said to be in derogation of the common law, or declaratory of it, unless the subject is one that was uncertain at common law. The common law of the various states differs very materially, but if no express rules are fixed the Declaration of Independence necessarily limits the period when the common law of England was a part of the law of the colonies. "In some of the states, the common law of England as it existed prior to the fourth year of King James I, is expressly adopted by statutes, and it results as a matter of course that the decisions of the courts of England subsequent to 1607, the date of the Charter of Virginia, under which the Colony was established, are not considered as binding. Other states fix the date of the common law so as to include the common law and all of the statutes in aid thereof prior to the Declaration of Independence, or prior to some arbitrary date during the Revolutionary period, so that the student may easily ascertain the fact in a particular jurisdiction by consulting the statutory or constitutional provision."⁷

"When, therefore, they (the Colonists) emerged from the colonial condition into that of independence, the laws which governed them consisted, first, of the common law of Eng-

⁶ Fed. Cas. No. 16766, 2 Dall. (U. S.) 384, 1 L. ed. 426.

⁷ Andrew's American Law (2d ed.) § 162. See also *Kallenbach v. Dickenson*, 100 Ill. 427.

land, so far as they had tacitly adopted it as suited to their condition; second, of the statutes of England, or of Great Britain, amendatory of the common law which they had in like manner adopted; and, third, of the colonial statutes. The first and second constituted the American common law, and by this in great part are rights adjudged and wrongs redressed in the American States to this day."⁸

The Practice of Comity Between States.—Comity is not enforceable law, but a principle of agreeable and diplomatic usage in the recognition by the several states of the Union of the applicability of foreign laws in some cases over domestic territory. Of course it may be made enforceable by legislative action. Thus we find:

Effect is sometimes given to a foreign law because justice and policy often demand that in the enforcement and interpretation of contracts and other transactions possessing a foreign element the court should be governed by some other than the domestic law.⁹

Where the principle involves a fundamental and important policy of the state established after careful consideration of the supposed needs and wants of the people, no foreign law will be permitted to supersede it. The legislature is primarily the judge of questions of policy, and if it has spoken plainly either for or against the enforcement of a foreign law in a given case the court must obey. If it has not indicated expressly that a particular domestic policy should control in all cases, it then devolves upon the courts to determine in what cases it should control.¹⁰

⁸ Cooley's Const. Lim. (7th ed.) p. 52. See also *Smith v. Alabama*, 124 U. S. 478, 1 L. ed. 508; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346 (a natural common law). The acts of Parliament passed after the settlement of a colony were not in force therein unless made so by express words or adoption. *Lavalle v. Strobel*, 89 Ill. 370; *Swift v. Tousey*, 5 Ind. 196; *Commonwealth v. Lodge*, 2 Grat. (Va.) 579. But see 4 Works of Franklin by Sparks.

⁹ Minor's Conflict of Laws, § 4.

¹⁰ *Green v. Van Buskirk*, 5 Wall. (U. S.) 307, 18 L. ed. 599, 33 How. Pr. 18; *Bowles v. Field*, 78 Fed. 742; *Matthews v. Lloyd*,

As between innocent citizens and strangers the courts generally elect in a close case to decide the matter in accordance with the *lex fori*, thus giving their fellow citizens the advantage conferred upon them by the law under which they live and ordinarily transact their business. This exception to the enforcement of the proper law is past dispute, although its limits are not yet exactly defined.¹¹

The penal laws in one state will have no extra territorial effect in another state. This principle is universally admitted. Other states will not aid in these matters further than to surrender a fugitive from justice under extradition treaties or laws. But the authorities do not agree as to the meaning of penal in the international sense of the word. If the statute is remedial rather than punitive the rule is different.¹²

89 Ky. 625, 13 S. W. 106; *Cross v. United States Trust Co.*, 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. 597; *State v. Kennedy*, 76 N. Car. 251, 22 Am. Rep. 683. In order to determine the legislative view of the importance of the law at the time of its enactment, consideration may be given to legislation subsequent to the transaction in dispute. *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420, 37 L. R. A. 452, 57 Am. Rep. 112; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Case v. Dodge*, 18 R. I. 661, 29 Atl. 785.

¹¹ *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Green v. Van Buskirk*, 5 Wall. (U. S.) 307, 18 L. ed. 599, 33 How. Pr. 18; *Egbert v. Baker*, 58 Conn. 319, 20 Atl. 466; *Catlin v. Wilcox Silver-Plate Co.*, 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. 338; *Saul v. His Creditors*, 5 Mart. (N. S.) (La.) 569, 16 Am. Dec. 212; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. 654; *Armstrong v. Best*, 112 N. Car. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. 473; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Williams v. Kemper, &c.*, *Dry Goods Co.*, 4 Okla. 145, 43 Pac. 1148; *Long v. Girdwood*, 150 Pa. St. 413, 24 Atl. 711, 23 L. R. A. 33n; *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214, 10 Am. St. 690; *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, 36 Am. St. 899.

¹² *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123; *The Antelope*, 10 Wheat. (U. S.) 66, 6 L. ed. 268; *Boyce v. Wabash R. Co.*, 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730; *Dale v. Atchison, T. & S. F. R. Co.*, 57 Kans. 601, 47 Pac. 521; *First Nat. Bank v. Price*, 33 Md. 487, 3 Am. Rep. 204; *Commonwealth v. Green*, 17 Mass. 515; *Midland Co. v. Broat*, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. 654; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Dickson*

It is generally admitted that transactions relating to realty or fixed property of all kinds are to be governed by the law of the place where the property is situated, but upon question of contract and other transactions the rules are so numerous that a special work upon this subject must be consulted. The subject of "private international law", to say nothing of international law, is a theme of considerable scope and growing importance.¹³

To a limited extent the courts practice comity between different jurisdictions in following established rulings.

Difference Between Interpretation and Construction.—Although in common usage the words are used synonymously, nevertheless each has been defined in more technical application to cover a field particularly its own and the distinction is valuable whether the terms be rightly applied or not.

Interpretation, in a strict sense, is held to refer to finding out the true sense which the author intended to convey by any particular form of expression. Its object is discovery of content directly expressed and the making this content clear to others. Its field is limited to the letter of the text.

Construction, on the other hand, begins where interpretation ends, and to draw conclusions from such content respecting its relation to subjects that lie beyond the direct expressions of the text, conclusions which are within the spirit of the text and drawn from elements within, but having an extra textual bearing. Construction applies when two different enactments by the same legislative body without intention

v. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444; *St. Sure v. Lindsfelt*, 82 Wis. 346, 52 N. W. 308; 19 L. R. A. 515, 33 Am. St. 50.

¹³ *United States v. Crosby*, 7 Cranch (U. S.) 115, 3 L. ed. 287; *Clark v. Graham*, 6 Wheat. (U. S.) 577, 5 L. ed. 334; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105; *Heine v. Mechanics, &c., Ins. Co.*, 45 La. Ann. 770, 30 So. 1; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974, 28 Am. St. 426; *Knox v. Jones*, 47 N. Y. 389, 395; *Williams v. Saunders*, 5 Cold. (Tenn.) 60; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

contradict, or when one part of an instrument contradicts the rest. So too, where some unforeseen case arises to which the instrument must be adjusted. Bouvier's Law Dictionary makes the following distinction: "Interpretation, the discovery and representation of the true meaning of any signs used to convey ideas." "Construction, in practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will or other instrument, or of any oral agreement."¹⁴

Theory of Strict and Loose Construction.—Under the stimulus of political agitation in the early days of the republic over the powers conferred by the constitution two rival schools of interpretation sprang up. The one terming themselves strict constructionists held that the language of the constitution should be construed literally and conservatively, while the other party held with equal fervor that the instrument should be construed liberally and according to the spirit rather than the letter, so that they were denominated loose constructionists.

Needless to add that momentous questions of public policy depended for their solution upon which theory should prevail. The history of our great constitutional cases, especially during the days of John Marshall, show that what the political parties failed to solve was accomplished by a line of great Supreme Court decisions in which the powers of the Federal Government under the constitution were for all time defined with a wisdom for prudence and outlook which could not be described by either of the terms, strict or loose. The words were not happily chosen. As to what was strict or loose might not be uniform throughout the instrument. The looseness or strictness of the language was really the problem, and not a strict or loose method to be always applied. The purpose of the particular provision must involve

¹⁴ See also Lieber *Legal and Political Hermeneutics*; Smith on *State Constitution*, 600.

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a wide enough intent to carry such purpose into execution. And the scope of such intent determined how strictly or how liberally the language of the particular provision was to be construed. Thus the epoch making opinions of Chief Justice Marshall gave ample power under the constitution for this government to meet all of the requirements of future progress.

The idea of strict or liberal construction, however, has assumed an application over all written instruments having a legal bearing. Bishop, in his latest edition on Statutory Crimes,¹⁵ gives the following succinct statement of the practical application of the idea to statutes: "It is little else than repeating what has already been said to add, that the constructions of different statutes will be more or less strict or liberal according to the different pressures of the controlling principles. For the interpretation of no law, written or unwritten, comes from any one rule alone, but from all the legal reasons applicable to the case combined. One principle may bear more or less strongly in a particular direction, and another in another, and the result will be the product of the combined forces. For example, a statute may be more or less penal, the consequence of which is that the more severe the punishment it directs, and the heavier the crime, the more strict must be its interpretation; or two principles may operate in the same direction, and **their** power combined is greater than that of one alone; or the one principle may press one way and the other another way. Thus, in construing statutes to prevent frauds, suppress public wrongs, or effect a public good,—objects which the law favors,—there is a pressure toward a liberal interpretation; but if they also provide a penalty, being a thing odious to the law, there is another pressure toward the strict rule; so the balance may be in equipoise, or the one scale or the other may simply preponderate, according to the special circumstances of the

¹⁵ Bishop Stat. Crimes (3d ed.) § 199.

case or the views of the particular judge. But rarely will any court so extend an enactment by construction as to involve penal consequences not within its express words."

An approximately true dividing line between the two interpretations may be found by holding that a given statute is to reach no further in meaning than its words involve no person by implication, and the accused to have the benefit of the doubt in application. Nevertheless, strict construction does not require that the law be always pressed into the smallest possible limits, but is exemplified by varying degrees. The following rules or principles relating to the two methods of interpretation are also quoted from Bishop.¹⁶ On strict interpretation:

First. "Equally in strict interpretation as in liberal, the statutes may be extended by other provisions of statutory law, and by the common law combining with them."

Second. "The rule of strict interpretation is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings."

Third. "It is not a violation of the rule of strict construction to give the words of a statute a reasonable meaning, according to the intent of the makers, disregarding capitious objections and even the demands of an exact grammatical propriety."

Fourth. "The words of a penal or other statute requiring a strict construction must not be extended beyond what they will fairly and reasonably bear."

Fifth. "If, in a criminal case requiring the strict construction of a statute, the court entertains a reasonable doubt of its meaning, this doubt will prevail in favor of the accused."

Sixth. "In strict construction, no case is to be brought within the statute unless completely within its words."

On Liberal with Strict Interpretation:

¹⁶ Bishop Stat. Crimes (3d ed.) §§ 203, 204 et seq.

First. "In favor of defendants, criminal statutes will be contracted by interpretation, so as to avoid punishing those who, though breaking their letter, have not violated also their spirit."

Second. "In favor of defendants, criminal statutes, like remedial, will be expanded in their meaning."

The Letter and Spirit of Law.

Law is often regarded as having two phases, the one expressed by the letter, and the other by the spirit of the statute. While each is presumed to be in harmony and reflect the other, yet instances occur in which a variance exists, and then the question arises as to which should be given preference. No doubt the two aspects are at bottom a contrast between the purpose or intent of the statute, and the linguistic medium through which it is expressed, but it is easy to enlarge the "spirit", to include not merely what was designed to be expressed, but what ought to be expressed, in short, a contrast between the words interpreted without regard to consequences, and the same words interpreted with regard to a moral ideal. It is probable that the latter goes further than is strictly warranted, and that the more nearly correct use of the term would be to view an interpretation of the letter only, as an estimation of the words which lays too much stress upon their isolated and independent meanings and that, conversely, an interpretation in accord with the spirit, would be realized by estimating the words only in relation to the unity of all taken together—assuming that the latter point of view will reveal the true intent of the makers whatever that may have been. And yet the moral ideal, if used as an expression of our system of law as a whole and not an ethical concept in advance of that system, is recognized in a negative way, as follows: "All laws", said Field, J., speaking for the Supreme Court of the United States,

"should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."¹⁷

In the case of *Eyston v. Studd*,¹⁸ we find the following clear statement: "It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, namely, of body and soul. The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law. . . . And it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive."

The Principles of Res Judicata and Stare Decisis.

Not infrequently the validity of a legislative enactment will be decided in a private litigation, and the question naturally arises as to what effect such a decision produces. The answer involves two propositions. The first relating to the facts litigated in the particular suit, and the second relative to the principle of law determined at the same time. The former is covered by the doctrine of *res judicata*, the second by the doctrine of *stare decisis*.¹⁹

¹⁷ *United States v. Kirby*, 7 Wall. (U. S.) 482, 19 L. ed. 278.

¹⁸ 2 Plow. 459, 465. See also *Minor v. Mechanics Bank*, 1 Pet. (U. S.) 46, 64, 7 L. ed. 47; *Church v. Crocker*, 3 Mass. 17, 21; *Holbrook v. Holbrook*, 1 Peck. (Mass.) 248, 254; *New Orleans, &c., R. Co. v. Hemphill*, 35 Miss. 17; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

¹⁹ *Dutchess of Kingston's Case*, 11 State Trials 261, 2 Smith's Lead. Cas. 424; *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684; *Young v. Black*, 7 Cranch (U. S.) 565, 3 L. ed. 440; *Chapman v. Smith*, 16 How. (U. S.) 114, 14 L. ed. 868; *Frink v. Darst*, 14

Res judicata is the legal status of a cause of action and its attendant facts being forever settled as between the parties to the action and their privies. The rule is intended to put an end to litigation once regularly conducted, and is so inflexible that even if it were subsequently held that the particular decision was erroneous, still such fact would not authorize the reopening of the case to correct the palpable error. The doctrine has a twofold application which should always be distinguished. It refers both to the cause of action as a whole and also to any particular fact which is litigated. The former precludes the same cause of action from being tried again, and the second prevents any particular fact from being litigated again under a different cause of action. But conclusive as the rule is when applied to the subject-matter as set forth in the facts litigated, it does not bind third parties as to these facts nor the parties and privies interested as to the principle of law decided in relation to other situations, and this raises the second question in connection with the principle of law.

Stare decisis is, in turn, the legal status of a principle of law to the effect that it should be followed by the courts in adjudicating cases involving an analogous set of facts within the same jurisdiction. The foundation for the rule is that reasons which were sufficient in the particular case ought to be equally sufficient in subsequent cases involving the same elements. This works for uniformity in law and economy in administration. As Chancellor Kent said, "It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them and people in general can venture to buy and trust and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great land-

III. 304, 58 Am. Dec. 575; *People v. Cicotte*, 16 Mich. 283, 97 Am. Dec. 141; *Palmer v. Lawrence*, 5 N. Y. 389; *Bates v. Relyea*, 23 Wend. (N. Y.) 336; *Nelson v. Allen*, 1 Yerg. (Tenn.) 360, 376; *Kneeland v. Milwaukee*, 15 Wis. 454; *Brooms Maxims* 109.

marks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court except for very urgent reasons and upon a clear manifestation of error, and, if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law."²⁰

"It is more important", says Mr. Justice Field, "that the court should be right upon later and more elaborate consideration of the cases than consistent with previous decisions",²¹ and while the courts almost invariably adhere to a decision which has become a rule of property, and a trial court is usually bound by the decisions of the higher court in the same jurisdictions, it is not always a hopeless task to attack a judicial decision as the number of overruled cases in every jurisdiction will show.

²⁰ 1 Kent's Comm. 476. See also Elliott's Work of the Advocate, 420; Paul v. Davis, 100 Ind. 422, 427.

²¹ Barden v. Northern Pac. R. Co., 154 U. S. 288, 38 L. ed. 992.

CHAPTER V.

ESTIMATING THE WRITTEN LAW.

Nature of the Written Law.

In general, the process of estimating written law involves, as we have seen, an ascertainment of its proper meaning, and this fundamental need first found scientific expression by the Roman jurists. The rules of interpretation formulated by the civil law, when the Roman Empire was laying the foundations of jurisprudence, have supplied a basis for the continuation of modern doctrines upon this subject in the western world. A few of these principles are, therefore, not irrelevant as a preface to what is to follow.

Roman Interpretation.

By what was termed "Diplomatic Criticism", the Romans determined first the legitimacy of a text. Thereupon its further interpretation was ascertained by the application, if need be, of two general methods, that is, the grammatical and logical methods,¹ the former confining itself to the examination of the literal words, and the latter, when this failed, investigating the object which was in view. Supplementary to the latter, it was sometimes necessary to consider contemporaneous or current legislation, and this was called "Systematical Interpretation". Or again they went still further by means of a "Historical Method", and by consulting former enactments, treaties and conventions, endeavored to discover

¹ *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016; *Texas & Pac. R. Co. v. Interstate Commerce Comm.*, 162 U. S. 197, 40 L. ed. 940; *United States v. Texas*, 162 U. S. 1, 40 L. ed. 867; *United States v. Stanford*, 161 U. S. 412, 40 L. ed. 751; *Sioux City &c. R. Co. v. United States*, 159 U. S. 349, 360, 40 L. ed. 177; *Holmes v. Wiltz*, 11 La. Ann. 439.

what had been evolved and intended relative to the subject in hand.

While agreements between parties is not written law in the customary sense, yet a contract is subject to the same general principles of interpretation, and as Mr. Howe says in his *Studies in the Civil Law*,² "It is manifest that one of the most important and delicate duties of counsel and of courts is found in the endeavor to interpret agreements and in this way to discover the obligations which such agreements may create. The matter is often full of difficulty." From the same author we take the following rules:

1. "The first rule, to which attention may be called, declares that in all agreements regard should be had to the common intention of the parties, in view of the subject-matter, rather than to the grammatical or the literal sense of the terms employed."

However, this rule must not be misunderstood to encourage the making of agreements for the parties either by counsel or by the court, but merely to find out what agreement the parties have made for themselves, and hence not to disregard the letter under an excuse of pursuing the spirit. To prevent such a process the Roman Law had a maxim as follows:

2. "Where there is no ambiguity in the words, a pursuit of the intention outside of those words should not be permitted." Yet Domat, in the application of this rule, says that where the literal meaning leads to absurdity, and the intent is elsewhere evident, it should be followed.³ A curious example of this kind is reported by the Court of Cassation of France in 1865 from Algeria.⁴

² Howe's *Studies in The Civil Law*, 125-130.

³ *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. (U. S.) 276, 290, 19 L. ed. 349.

⁴ Dalloz (1866) 1, 108.

3. "Another important rule of interpretation is, that when a clause is capable of two significations, it should be understood in that which will have some operation rather than that in which it will have none."⁵ This rule needs no explanation and has frequently been followed in England and the common law states of our own country.
4. Another rule is, that what is ambiguous in the words of a contract may be explained by the customs of the country where it is made.⁶
5. A fifth rule of interpretation is, that "we ought to supply in a contract those customary clauses which are not expressed."⁷
6. A sixth rule of the Roman Law was that "we ought to explain one clause of an agreement by the others, whether they precede or follow, and an example is given from Proculus in the Pandects which would probably be good law in England today."⁸
7. A seventh rule is that "however general may be the terms of an agreement, it should be held to comprise only those things with respect to which it appears that the parties are intending to contract. An example of this rule is found in the Roman Law in regard to transactions or compromises, and the same law obtains in France and Louisiana."^{8a}

Rules of Constitutional Interpretation.

On the general nature of constitutions the following principles are applicable:

1. A written constitution is not the origin or source of human rights, but is only by limitation a measure of the power of government in the hands of its agents,

⁵ Howe's Studies Civil Law, 129, par. 2; Dig. 45, 1, 80.

⁶ Nash v. Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527.

⁷ Howe's Studies in Civil Law, 129, par. 4; Dig. 21, 1, 31, 20.

⁸ Howe's Studies in Civil Law, 130, par. 5; Dig. 50, 16, 126.

^{8a} Howe's Studies in Civil Law, 130, par. 6.

hence as a mere protector of rights and measure of power it does not express all of the latent or dormant possibilities of the people, nor prohibit their future realization.⁹

2. A cardinal rule in dealing with written instruments of a fixed character is that they are to receive an unvarying interpretation and that their practical construction is to be uniform. "What a court is to do is to declare the law as written", leaving it to the people themselves to make such changes as new circumstances may require. The meaning of a constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.¹⁰
3. A question of constitutional law may be decided in a private litigation, and when so it is an inflexible principle of law, that it is forever conclusive upon the parties and their privies in the subject-matter of the suit. As to other parties the same question may thereafter be decided differently. The doctrine of *res judicata* is as applicable to the validity of a statutory enactment as to a contract or individual act.¹¹
4. Where a general power is conferred, or duty enjoined in a constitution, every particular power necessary for the exercise of the one or performance of the other is conferred by necessary implication. Such implication, however, must be necessary in contrast to merely a conjectural or argumentative one, and if the means for the exercise of a general power be given, no other means may be implied.¹²

⁹ *Lee v. State*, 26 Ark. 265, 7 Am. Rep. 611; *People v. Hurlbut*, 24 Mich. 44, 107, 9 Am. Rep. 103; *Hamilton v. St. Louis County Ct.*, 15 Mo. 13; *In re Oliver Lee*, 21 N. Y. 9; 2 Webster's Works, 392; 1 Bl. Comm. 124; 2 Story, Life and Letters, 278; Sidney on Government, ch. 3, §§ 27, 33.

¹⁰ *Scott v. Sandford*, 19 How. (U. S.) 393, 15 L. ed. 691; *People v. Blodgett*, 13 Mich. 127.

¹¹ *Young v. Black*, 7 Cranch (U. S.) 565, 3 L. ed. 440; *Chapman v. Smith*, 16 How. (U. S.) 114, 14 L. ed. 868; *Dutchess of Kingston's Case*, 11 State Trials 261, 2 Smith's Lead. Cases 424.

¹² *United States v. Fisher*, 2 Cranch (U. S.) 358, 2 L. ed. 304; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 358, 4 L. ed. 579; *Woodson v. Murdock*, 22 Wall. (U. S.) 351, 381, 22 L. ed. 716; *Hen-*

5. A constitution should operate prospectively only unless a clear intention otherwise is expressed.¹³
6. When a constitution is revised or amended the new provisions come into operation at the same moment that those they take the place of cease to be in force, and must be complete and not conditional and dependent for their force upon the subsequent acts and discretion of certain officers.¹⁴
7. "In pursuance of the personal intent of the makers, a constitutional provision adopted from another state after it had been judicially interpreted will, in the absence of any contrary indications, retain the meaning thus previously ascertained."¹⁵
8. "When the constitution defines the circumstances under which a right may be exercised or a penalty enforced, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases."¹⁶
9. The rules which distinguish directory and mandatory statutes do not apply with equal authority to constitutions, and Mr. Justice Emmot says, "It will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative."¹⁷
10. Dormant provisions in a constitution do not displace the law previously in force until the manifest pur-

shaw v. Foster, 9 Pick. (Mass.) 312; People v. Cowles, 13 N. Y. 350; People v. Fancher, 50 N. Y. 291; Temple v. Mead, 4 Vt. 535, 540.

¹³ Brown v. Wilcox, 22 Miss. 127; Dash v. Van Klek, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; Allbyer v. State, 10 Ohio St. 588; Price v. Mott, 52 Pa. St. 315.

¹⁴ Livermore v. Waite, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; Blackwood v. Van Vleit, 30 Mich. 118; State v. Powell, 77 Miss. 543, 27 So. 927, 48 L. R. A. 652; Gilkey v. Cook, 60 Wis. 133, 18 N. W. 639; Laude v. Chicago, &c., R. Co., 33 Wis. 640.

¹⁵ Bishop Stat. Crimes (3d ed.) §97. See also People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; Wilson v. Bradley, 105 Ky. 52, 48 S. W. 1088; Fisher v. Deering, 60 Ill. 114; Attorney-General v. Brunst, 3 Wis. 787.

¹⁶ Thomas v. Owens, 4 Md. 189. See also In re Dorsey, 7 Port. (Ala.) 293; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

¹⁷ People v. Lawrence, 36 Barb. (N. Y.) 177, 186. See also Wolcott v. Wigton, 7 Ind. 44; Varney v. Justice, 86 Ky. 596, 6 S. W. 457; State v. Glenn, 18 Nev. 34, 1 Pac. 186; Cannon v. Mathes, 8 Heisk. (Tenn.) 504, 517.

pose to do away with it by supplementary legislation required is put in operation by such legislation.¹⁸

11. When the intent is unmistakable, but the exercise of a power thus conferred in a constitution leads to injustice, or in contravention of a more general intent or spirit of the instrument, the provision, when free from doubt, must receive the same construction as any other. The remedy for such injustice must be found in amendment.¹⁹
12. While the common law is to be kept in view, the maxim of the courts that statutes in derogation of the common law should be construed strictly should not be applied to constitutions without great caution.²⁰

On the more specific contextual interpretation the following rules prevail:

- Rule 1. That which the words on the face of the instrument declare to be its meaning, neither courts nor legislation thereafter have a right to add to or take away.²¹
- Rule 2. The whole instrument should be examined to give such a construction as will render every word operative rather than to make some words idle and nugatory.²²
- Rule 3. Words, phrases and clauses are presumed to have been employed in their natural and ordinary meaning when ordinary in character, but when technical according to such use at the time adopted.²³

¹⁸ *People v. Lake Co.*, 33 Cal. 487; *Williams v. Detroit*, 2 Mich. 560; *Lehigh Iron Co. v. Lower Macungie*, 81 Pa. St. 482; *Erie County v. Erie*, 113 Pa. St. 360, 6 Atl. 136.

¹⁹ *People v. Rucker*, 5 Colo. 455; *People v. Fisher*, 24 Wend. (N. Y.) 215; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

²⁰ *Brown v. Fifield*, 4 Mich. 322; *White v. Zane*, 10 Mich. 333; *Rankin v. West*, 25 Mich. 195; *Harrison v. Leach*, 4 W. Va. 333.

²¹ *Newell v. People*, 7 N. Y. 1, 97; *Denn v. Reid*, 10 Pet. (U. S.) 524, 9 L. ed. 519; *Greencastle Tp. v. Black*, 5 Ind. 565.

²² *Wolcott v. Wigton*, 7 Ind. 44; *Chance v. Marion*, 64 Ill. 66; *Dubuque v. Dubuque*, 7 Iowa 262; *Dyer v. Bayue*, 54 Md. 87; *Attorney-General v. Detroit, &c., Road Co.*, 2 Mich. 138.

²³ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 188, 6 L. ed. 23; *Way*

- Rule 4. After having made use of all the lights which the instrument itself affords and doubts and ambiguities still remain, recourse may then be had to extrinsic evidence.²⁴
- Rule 5. Since the most of our constitutions are the legitimate successors of the Great Charter of English liberty whose provisions have acquired a well understood meaning, our constitutions should be understood in the light of the history preceding them.²⁵
- Rule 6. The purpose of the adoption, as revealed in the object to be accomplished, or the mischief designed to be remedied or guarded against by the clause in which the confusion exists, should enable the difficulty to be removed, but there should be no vague or uncertain conjecture as to such purpose, and the prior state of the law sometimes furnishes a clue to the situation, especially where one constitution is the successor of another.²⁶
- Rule 7. Construction of an instrument contemporaneous with such instrument and involved in putting the instrument in operation, and from which rights have accrued and become vested, together with subsequent acquiescence by the courts, raise a strong presumption in favor of such construction. This doctrine has been supported by Chief Justice Marshall in a case involving the point in which he says, "Great weight has always been attached and very rightly attached to contemporaneous exposition."²⁷

v. Way, 64 Ill. 406; *State v. Mace*, 5 Md. 337; *Settle v. Van Evrea*, 49 N. Y. 581; *Jenkins v. Ewin*, 8 Heisk. (Tenn.) 456; 22 Hansard's Debates 1184; Story on Const. (5th ed.) § 453.

²⁴ *Ball v. Chadwick*, 46 Ill. 28; *Alexander v. Worthington*, 5 Md. 471; *Smith v. People*, 47 N. Y. 330; *People v. Purdy*, 2 Hill (N. Y.) 35, 37.

²⁵ *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Bandel v. Isaac*, 13 Md. 202; *Servis v. Beatty*, 32 Miss. 52; *People v. Gies*, 25 Mich. 83; *Hamilton v. St. Louis County Ct.*, 15 Mo. 3; *Henry v. Tilson*, 19 Vt. 447.

²⁶ *People v. Blodgett*, 13 Mich. 127.

²⁷ *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 5 L. ed. 257. See

Rule 8. The proceedings of a convention which frames a constitution on the question of the intent of its provisions, is not so conclusive a means of determination as in the case of a legislature which passes a statute, since it is the intent of the people who ratify a constitution rather than of the particular representatives who frame it, which gives it force, while in the latter it is the intent of the legislature which is sought.²⁸

Rule 9. A power granted in general terms is to be construed as co-extensive with the terms unless some clear restriction may be deduced expressly or impliedly from the context. This rule has been applied frequently upon legislative encroachments upon the power of the judiciary.²⁹

Rules of Treaty—Interpretation.

Although the need of estimating the meaning or value of a treaty provision seldom falls within the field of the ordinary practitioner, yet the relation of statutes to treaty regulations is of sufficient importance to justify a few broad observations and rules.

On the general subject of treaty interpretation from an international point of view, Hannis Taylor, in his work on International Public Law, says: "In view of the fact that some of the most serious wars in history have arisen out of conflicting opinions as to the real meaning of treaty stipulations, it is not strange that publicists and jurists from the time of Grotius down to our own should have made every effort to formulate a set of rules designated to remove at least in part the difficulties incident to their construction and

also *Martin v. Hunter*, 1 Wheat. (U. S.) 304, 351, 4 L. ed. 97; *Story on Const.* (5th ed.) §§ 405, 408, 418.

²⁸ *Aldridge v. Williams*, 3 How. (U. S.) 9, 11 L. ed. 469; *Hills v. Chicago*, 60 Ill. 86; *State v. Mace*, 5 Md. 337; *People v. Harding*, 53 Mich. 481, 19 N. W. 155; *Taylor v. Taylor*, 10 Minn. 107.

²⁹ *Fletcher v. Oliver*, 25 Ark. 289; *Field v. People*, 3 Ill. 79, 83; *Du Page v. Jenks*, 65 Ill. 275; *Story on Const.* (5th ed.) §§ 424, 426.

interpretation. . . . The only real advance made in that direction has been by those who, disregarding metaphysical distinctions, arbitrary formula, and minute and confusing subdivisions, have contented themselves with simply adapting to the purpose of International Law, as far as applicable, such general principles as have been developed and approved by experience in the construction of statute and private contracts." And speaking further, of the method of "Interpretation", the process through which the meaning of particular terms is explained by reference to local circumstances and idioms the framers had in mind at the time, he adds, "Only to that extent can matters aliunde the treaty be employed to explain its meaning. No court or other expounder can supply a casus omissus in a treaty any more than in a law."³⁰

On the Order of Supremacy.

- Rule 1. By virtue of the fact that a treaty becomes a law only through the provision of the Constitution of the United States, it therefore becomes subject to the same. "All laws in whatever form or from whatever source proceeding, contrary to it are void."³¹
- Rule 2. A treaty is superior both to the constitution and to the statutes of the states; and to it, in case of a conflict, they must yield.³²
- Rule 3. The judicial doctrine seems to be established that the courts can not declare a federal statute

³⁰ See also *The Amiable Isabella*, 6 Wheat. (U. S.) 1, 5 L. ed. 191.

³¹ United States Const., Art. 6. See also *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 625, 4 L. ed. 629; *Livingston v. Moore*, 7 Pet. (U. S.) 469, 8 L. ed. 751; *Green v. Biddle*, 8 Wheat. (U. S.) 1, 5 L. ed. 547; *Calder v. Bull*, 3 Dall. (U. S.) 386, 399, 1 L. ed. 648.

³² *Bishop Stat. Crimes* (3d ed.) 7, § 13. See also *Ware v. Hylton*, 3 Dall. (U. S.) 199, 1 L. ed. 568; *Baker v. Portland*, Fed. Cas. No. 777, 5 Sawy. (U. S.) 566; *Gordon v. Kerr*, Fed. Cas. No. 5611, 1 Wash. (C. C.) 322; *Fellows v. Blacksmith*, 19 How. (U. S.) 366, 15 L. ed. 684; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 4 L. ed. 613; *People v. Gerke*, 5 Cal. 381.

void on the ground of motives when it is a war measure, even though it overrides a treaty so that, in practice, an act of congress may be superior to a treaty, while also a treaty may supersede an act of congress. The result is that in general a treaty takes precedence over a statute.³³

Rule 4. "A treaty may divest rights which have accrued under an existing law, and the nation may be obliged to give effect to this treaty divesting the individual rights."³⁴

Rule 5. "While treaties are recognized as a part of the supreme law of the land, the provisions of a treaty, while binding as to the civil rights obtained under it, can not bind future legislation curtailing the privileges therein relating to the right to become citizens."³⁵

On Relation to the Courts.

Rule 6. The courts take judicial notice of a treaty and give it effect precisely as they do the constitution and acts of congress, hence they must and do interpret the treaty, yet when the political department has spoken they follow its interpretation, decrying themselves to be, as said Eyre, C. J., in an English case, "not even the expounders of treaties".³⁶ Says Chief Justice Marshall: "Our constitution declares a

³³ *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266; *The Cherokee Tobacco*, 11 Wall. (U. S.) 616, 20 L. ed. 227; *Foster v. Neilson*, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415; *United States v. Tobacco Factory*, Fed. Cas. No. 16528, 1 Dill. (U. S.) 264; *Taylor v. Morton*, Fed. Cas. No. 13799, 2 Curt. (C. C.) 454; *Ropes v. Clinch*, Fed. Cas. No. 12041, 8 Blatch. (U. S.) 304; *Webster v. Reid*, 1 Morris (Iowa) 467.

³⁴ *Andrew's American Law* (2d ed.) 193, § 156. See also *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *United States v. The Peggy*, 1 Cranch (U. S.) 103, 2 L. ed. 49; *Martin v. Hunter*, 1 Wheat. (U. S.) 304, 373, 4 L. ed. 97.

³⁵ *Andrew's American Law* (2d ed.) 572, 573. See also *Boyd v. State*, 143 U. S. 135, 36 L. ed. 103; *Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068.

³⁶ *Marryat v. Wilson*, 1 Bos. & P. 430, 433.

treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule of law."³⁷

General Construction.

- Rule 7. When a statute and a treaty have been made with reference to each other, to carry out a common object they are to be construed together.³⁸
- Rule 8. A treaty takes effect from the time it is signed; its subsequent ratification relating back to such time. It is not in this respect affected by the special terms of our constitution.³⁹
- Rule 9. The canon common to all forms of written instruments that meanings of words and phrases will vary with the subject-matter from informal to technical, applies likewise to the interpretation of treaties.⁴⁰
- Rule 10. Construction of treaties must necessarily follow the rules deduced by international usage which are in many respects the same as those governing other written laws.⁴¹

³⁷ Foster v. Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415. See also United States Const., § 14.

³⁸ Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386; Reg. v. Wilson, 9 Car. & P. 27.

³⁹ Haver v. Yaker, 9 Wall. (U. S.) 32, 19 L. ed. 571; Hylton v. Brown, Fed. Cas. No. 6982, 1 Wash. (C. C.) 343; Succession of Schaffer, 13 La. Ann. 113.

⁴⁰ Vattel's Law of Nations, bk. 2, ch. 17, § 281.

⁴¹ Vattel's Law of Nations, bk. 2, ch. 17, §§ 280, 295.

Rules of Statute Interpretation.

Of far greater importance than the estimation and interpretation of constitutions and treaties to the general practitioner, is the question of statutory construction. These cover not only federal statutes, state session laws and the ordinances of cities and towns, but also the adopted codes of many of the states. It is somewhat difficult to group systematically the numerous principles governing the estimation of the value and meaning of statutes, but in general the following points of approach may prove serviceable: First, from the point of view of the interpreter himself; second, from the standpoint of the formation or reformation of the statute; third, from the standpoint of the internal contextual meaning; fourth, from the point of view of the external relations of the statute to the system of which it is a part.

From the Viewpoint of the Interpreter.

Lord Chief Justice Coke once emphasized the personal side of the method when he is reported to have said in reply to an interrogation upon a question of law: "If it be common law I should be ashamed if I could not give you a ready answer; but if it be statute law I should be equally ashamed if I answered you immediately."

As to what the law in any particular legislative enactment involves, something more than legal theory—at least legal usage, calls to its aid numerous rules of verbal criticism, and hence collateral questions of lexicology, grammar, rhetoric, custom and the personal element enter into a correct estimation of its content. While not differing essentially from the problem presented by constitutions and treaties in this respect, yet the legislative enactment is subjected to greater possibilities of error and confusion in its process of creation.

In many instances it represents a compromise of conflicting opinions and purposes, and a composite of amendments passed in some instances in haste and amid excitement and passion so that special care is requisite to a proper interpretation.⁴⁸ As a result the following principles should be observed:

1. It is well to remember that mere rules of interpretation can not reveal all that may be desirable to know concerning the effect and weight of a statute, and there is need of instances of going beyond the formal rules of construction, hence:
 - a. It should not be assumed that the terms of the statute are given with precise accuracy even in an official publication.
 - b. A session law in an important case should be checked up by examining the legislative records.
 - c. The session laws covered in an unadopted revision should be examined to ascertain not only the precise terms, but also the punctuation.
 - d. Even in an adopted revision all of the session laws should be consulted together with the legislative records, the drafts, annotations and reports made and used by the commission in making the revision, so that it may be clear whether an intention existed to make a change in the law, and as to just what the precise nature of the change was in contemplation.
 - e. Nor is it wise to assume without investigation that the effect of the statute is what the legislative body desired, for it may be unconstitutional, or be void for repugnancy.

⁴⁸ Horton v. Mobile, 43 Ala. 598, 604; Leese v. Clark, 20 Cal. 387; State v. Brooks, 4 Conn. 446; Ollis v. Kirkpatrick, 2 Idaho 975, 976; Fretwell v. Troy, 18 Kans. 271; State v. Nicholls, 30 La. Ann. 980; Commonwealth v. Churchill, 2 Metc. (Mass.) 118, 124; Bingham v. Winona, 8 Minn. 441; State v. Clark, 54 Mo. 17, 14 Am. Rep. 471; Keyport Steamboat Co. v. Farmers Transp. Co.,

2. Nothing short of a direct examination of the actual words of the original text should be relied upon. Copies, transcripts and paraphrases are doubtful authorities.
3. Again, a statute should always be re-examined from the viewpoint of any new question involved, for the mind familiar with a statute from one point of view becomes peculiarly colored and blinded to its effects from a different angle.
4. The lawyer should weigh the statute not merely as to its support of his own theory, but also as to whether it can be harmonized equally well or at all with the position of his opponent.
5. A statute is doubly valuable for a particular case when it can not only be shown to support that view, but also in addition equally well or more so to exclude the opposite view.
6. "The legislature can not direct the courts how to construe a statute so as to affect past transactions, for such construction is a judicial, not a legislative, question."⁴⁴

From the Viewpoint of the Formation and Reformation of Statutes.

While, as already indicated, the making of law is often accomplished through the medium of court decisions, nevertheless the statute proper is the production of some legally authorized legislative body having a primarily prospective point of view. It is fundamentally directed toward the future in its effect and application, just as a decision of the court is directed conversely to the settlement of a past set of facts. The former thus presumes to formulate a rule, the latter to follow one, the former, therefore, to provide a

18 N. J. Eq. 13; *People v. Schoonmaker*, 63 Barb. (N. Y.) 44; *Sydnor v. Chambers*, Dall. Dig. (Tex.) 601, 603; *Pray v. Edie*, 1 T. R. 313, 314.

⁴⁴ *Dequindre v. Williams*, 31 Ind. 444. See also *United States v. Gilmore*, 8 Wall. (U. S.) 330, 19 L. ed. 396; *Kelsey v. Kendall*, 48 Vt. 24.

principle for general application, the latter to adjudicate a particular case. Statutes proper, consequently, not only involve processes of formation and reformation through amendment or repeal, but also general structural forms which are of significance to their proper interpretation. Thus:

1. A statute, in its complete form, should contain a title, a preamble and a body, or purview, as it is termed, and each should be taken into account in determining the meaning of the statute as follows:
 - a. The "title" of a statute may be considered in ascertaining the general intent when difficulties of ambiguity arise, but the cases in which it so operates are exceptional, for commonly the "title" will not extend or restrain any provision in the "body of the act".⁴⁵ The words of "the enacting clause" when larger in meaning will prevail even in a penal statute. In some states special effect is given to the "title" under a constitutional provision.
 - b. The "preamble" is of more import than the "title", although neither are, technically, "parts of the statute". According to Dwarris, "Lord Coke considered the rehearsal or preamble a key to open the understanding of the statute, . . . but English lawyers are aware how seldom the key will unlock the casket, how rarely the preamble is found to state, besides the primary occasion of the law, the full views of the proposer of it".⁴⁶ The

⁴⁵ *United States v. Union Pac. R. Co.*, 91 U. S. 72, 82, 23 L. ed. 224; *Hadden v. Collector*, 5 Wall. (U. S.) 107, 18 L. ed. 518; *United States v. Fisher*, 2 Cranch (U. S.) 358, 386, 2 L. ed. 304; *United States v. McArdle*, Fed. Cas. No. 15653, 2 Sawy. (U. S.) 367; *Cohen v. Barrett*, 5 Cal. 195; *Plummer v. People*, 74 Ill. 361; *People v. Gadway*, 61 Mich. 285, 28 N. W. 101, 1 Am. St. 578; *Burgett v. Burgett*, 1 Ohio 469; *Commonwealth v. Slifer*, 53 Pa. St. 71; *Nazro v. Merchants Mut. Ins. Co.*, 14 Wis. 319; *Rex v. Cartwright*, 4 T. R. 490.

⁴⁶ *Potter's Dwar.* (1871) 108. See also *United States v. Oregon &c. R. Co.*, 164 U. S. 526, 41 L. ed. 541; *Yazoo &c. R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302; *United States v. Claflin*, 97

recitations in the "preamble" must be accepted as at least *prima facie*, and perhaps conclusively correct in setting out the legislative perspective in enacting the statute. Its beginning is usually indicated by the term "whereas", etc.

- c. The "purview" is that part of an act of the legislature which begins with the words, "Be it enacted", etc., and ends with the repealing clause, but it is sometimes employed as excluding "provisos", "exceptions" and similar clauses.⁴⁷ By way of subdivisions there may be an "interpretation" clause though not always, which in effect may require a different interpretation than would otherwise be given to the statute, or to impart some particular signification to particular words, in which case the courts are generally bound to accept the same, and in general this form of clause is interpreted strictly;⁴⁸ an "enacting clause", which usually refers to the main body of the statute or some leading provision excluding its "provisos". These clauses sometimes include and sometimes do not include "exceptions";⁴⁹ a "saving clause", which exempts some special thing out of the things generally mentioned and which sometimes gives rise to nice questions of interpretation;⁵⁰ or again, there may be an "appeal clause", or a "clause" designating the place of operation, or the date of going into effect, and how long it shall

U. S. 546, 24 L. ed. 1082; *United States v. Briggs*, 9 How. (U. S.) 351, 13 L. ed. 170; *Branson v. Wirth*, 17 Wall. (U. S.) 32, 44, 21 L. ed. 566; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248, 251; *Bywater v. Brandling*, 7 Barn. & C. 643; *Mason v. Armitage*, 13 Ves. Jr. 25, 36.

⁴⁷ *Bouvier's Law Dict.*, title *Purview*. See also *Anderson's Law Dict.* 848; *Payne v. Connor*, 3 Bibb. (Ky.) 181; *Potter's Dwar.* (1871) ch. 4.

⁴⁸ *People v. Soto*, 49 Cal. 67; *Smith v. State*, 28 Ind. 321.

⁴⁹ *Clark's Appeal*, 58 Conn. 207, 20 Atl. 456; *Blasdell v. State*, 5 Tex. App. 263.

⁵⁰ *Potter's Dwar.* (1871) ch. 4, 177n; *Halliswell v. Bridgwater*, 2 *Anderson* 190, 192.

continue in force. Moreover, there may be one or more "provisos", which are conditions or limitations engrafted upon a preceding enactment, are ordinarily introduced by the word "provided" and without any contrary indication are construed to affect merely the one paragraph to which attached.⁵¹ So also an "exception" clause may exist, similar to a proviso and introduced by the word "except", but is operative only when the excluded matter would otherwise come within the enactment.⁵²

- d. Finally, marginal notes, where they are parts of the authentic record of the statute, and particularly if in any way attached to the bill during its passage, may have an effect similar to the "title", and in some instances what is in form a marginal note may be a part of the statute itself.⁵³

- 2. Both the common law and statutes affect modifications where used together and conflicting, sometimes curtailing and sometimes extending the meaning, although statutes are generally to be interpreted after the rules and incidents of the common law.

- a. Provisions in statutes which are only partly antagonistic may stand together so far as harmonious, but beyond this "a thing given in particular shall not be taken away by general words".⁵⁴ This rule applies not only to different provisions in the same statute, but also to different statutes. As a corollary to this doctrine when the harmony of the law requires, one statute will be construed as extending the effect of another. Thus the Act of Congress March 3, 1825, defining the

⁵¹ *Carroll v. State*, 58 Ala. 396; *Spring v. Olney*, 78 Ill. 101.

⁵² *Blasdell v. State*, 5 Tex. App. 263; *Woodard v. State*, 5 Tex. App. 296; *Smith v. State*, 5 Tex. App. 318; *Gast v. Assessors*, 43 La. Ann. 1104.

⁵³ *In re Venours Settled Estates*, L. R. 2 Ch. Div. 522, 525; *Rex v. Milverton*, 5 Ad. & El. 841, 854.

⁵⁴ *McFarland v. State Bank*, 4 Pike (Ark.) 410; *United States v. Nichols*, 4 McLean (U. S.) 23; *Felt v. Felt*, 19 Wis. 193.

crime of perjury against the United States was held to apply to false swearing under the statute of bankruptcy subsequently passed. Broadly speaking, general words may be restrained by particular words in a succeeding clause.

- b. When the common law and a statute do not harmonize, the specific provision in the common law prevails over the general statute as instanced in cases of infancy, insanity, coverture, mistakes of fact, etc., and particularly criminal statutes are likely to be cut short in this way.⁵⁵ By way of corollary the prior common law operates to extend the effect of a statute beyond its terms similarly to a prior statute.⁵⁶ Thus, by the common law, in the words of Holt, C. J., "It is a vain thing to imagine a right without a remedy", and hence, when the harmony of the law requires, whatever is necessary to make the statute effective will be implied. So also statutes may, where harmony requires, abridge or enlarge the common law as, for example, when a statute enlarges or diminishes the species of a class coming under a provision of the common law, that is, breaches of statutory duty and agreements contrary to law.⁵⁷

3. It is a principle of legislative law that one legislature can not bind a subsequent one nor even its own future acts beyond its rules of procedure, although a written constitution sometimes restrains repeals where vested rights or contracts are involved. As to what will amount to a repeal raises the question of non-user, custom, express words and implications.⁵⁸

⁵⁵ *Wilbur v. Crane*, 13 Pick. (Mass.) 284; *Preston v. Hunt*, 7 Wend. (N. Y.) 53.

⁵⁶ *Commonwealth v. Ahearn*, 160 Mass. 300, 35 N. E. 853; *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186.

⁵⁷ *Commonwealth v. Silsbee*, 9 Mass. 417; *Pangborn v. Westlake*, 36 Iowa 546.

⁵⁸ *United States v. Tynen*, 11 Wall. (U. S.) 88, 92, 20 L. ed. 153.

- a. By the better opinion no statute becomes void by non-user and must be enforced when the subject and occasion call, although the fact may support the implication of its repeal by inconsistent provisions in a later act. Nor can a custom to regard a statute repealed ever ripen into a repeal, for with us custom is admitted merely to supplement and not to supplant the prior law.⁵⁹
- b. The common form of repeal is for an act to say in terms that a particular statute, part of the same, or the common law, is hereby repealed.⁶⁰ Sometimes the clause declares "all acts within its purview are hereby repealed", or "that all laws in conflict, inconsistent with it or contravening it, are repealed", or there may be an amendment declaring "that such and such shall read in a particular way", thereby repealing all provisions not retained in the altered form. Or again, a provision "in lieu" of another repeals it.
- c. The law does not favor repeals by implication and they will not be adjudged to occur except when inevitable or plainly so intended, nor is such intent ever *prima facie* presumed, and hence, statutes derogatory of the common law, or of a prior statute are strictly construed and will not be held to repeal unless the new and the old are irreconcilably in conflict. Among the several states there are diversities of doctrine which must be separately considered.⁶¹
- d. Generally the repeal of a repealing statute revives the old law whether statutory or com-

⁵⁹ *Pearson v. International Distillery Co.*, 72 Iowa 348, 34 N. W. 1; *Kitchen v. Smith*, 101 Pa. St. 452.

⁶⁰ *State v. Beneke*, 9 Iowa 203; *People v. Henwood*, 123 Mich. 317, 82 N. W. 70.

⁶¹ *Wood v. United States*, 16 Pet. (U. S.) 342, 362, 10 L. ed. 987; *Waterworks v. Burkhart*, 41 Ind. 364; *In re Evergreens*, 47 N. Y. 216.

mon with some common law exceptions, but where a repealing statute expires by its own limitation the repealed law does not revive and the repeal of a statute terminates all legal proceedings under it applying even to a municipal by-law.⁶²

4. Perhaps the most fundamental law governing the interpretation of statutes is that the intent of the framers of the law shall be carried out, even where to do so overrides the ordinary rules of interpretation, and it is always presumed that the legislators expressed in the words of the statute what they intended to express.⁶³

- a. However, in ascertaining such intent the courts are limited to the language of the statute and its relation to the system of law into which it was made a part, together with the existing needs of the times, but in general can not resort to the opinion of the individual legislators, speeches, reports of committees or legislative journals associated with its production.⁶⁴

- b. The general intent having been drawn from the statute as a whole should prevail over the specific intent of its parts, and the latter

⁶² *Helt v. Helt*, 152 Ind. 142, 52 N. E. 699; *Commonwealth v. Churchill*, 2 Metc. (Mass.) 118.

⁶³ *United States v. Morrissey*, 32 Fed. 147; *Leoni v. Taylor*, 20 Mich. 148; *Farmers Bank v. Hale*, 59 N. Y. 53; *Encking v. Simmons*, 28 Wis. 272, 276; *Chapin v. Crusen*, 31 Wis. 209.

⁶⁴ *Texas & P. R. Co. v. Interstate Commerce Comm.*, 162 U. S. 197, 40 L. ed. 940; *Holy Trinity Church v. United States*, 143 U. S. 457, 463, 36 L. ed. 226; *Rector v. United States*, 92 U. S. 698, 23 L. ed. 698; *United States v. Union Pac. R. Co.*, 91 U. S. 72, 79, 23 L. ed. 224; *Wilkinson v. Leland*, 2 Pet. (U. S.) 627, 662, 7 L. ed. 542; *The Pauline v. United States*, 7 Cranch (U. S.) 52, 3 L. ed. 266; *Comverse v. United States*, 21 How. (U. S.) 463, 16 L. ed. 192; *Horton v. Mobile*, 43 Ala. 598; *Yale University v. New Haven*, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 290; *Glass v. Cedar Rapids*, 68 Iowa 207, 26 N. W. 75; *Funk v. St. Paul & C. R. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. 608; *Jersey City Gaslight Co. v. Consumers Co.*, 40 N. J. Eq. 427, 2 Atl. 922; *Burbank v. Fay*, 65 N. Y. 57; *Ex parte Kent*, L. J. (1891) 60 Q. B. Div. 435.

- should be construed as intended to be in harmony and carry out the general intent.⁶⁵
- c. Although the intent must be obtained from the words of the statute itself, supplemented by its relation to the system of which it is a part and the needs of the times, yet the application of this intent may require that it extend beyond the precise words of the statute.⁶⁶

From the Viewpoint of Contextual Wholeness.

Words are to be construed as limiting and being limited by the context of which they are a part. Their function in the statute is integral. Statutes are organic wholes and not a series of unrelated expressions. In carrying out this effect it should be observed:

- Rule 1. Since the statute may be presumed to have been framed for a given purpose, all words are construed to carry out the general purpose. To do this all parts of the statute, including title and preamble, may and should be considered.⁶⁷
- Rule 2. So also, since the statute is presumed to be a concise statement of the content, all words are given force, if possible, and words are treated as surplusage only under extreme necessity.⁶⁸
- Rule 3. Again, since the statute as a whole is presumed to express sense, convenience and justice, words are never given the opposite effect where these are possible.⁶⁹

⁶⁵ *Ex parte Ellis*, 11 Cal. 222; *Wabash v. Binkhert*, 106 Ill. 298; *Smith v. People*, 47 N. Y. 303.

⁶⁶ *In re Neagle*, 39 Fed. 833; *Riggs v. Palmer*, 115 N. Y. 506.

⁶⁷ *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *Nichols v. Halliday*, 27 Wis. 406.

⁶⁸ *People v. King*, 28 Cal. 265; *Root v. Sinnock*, 24 Ill. App. 537; *In re Opinion of Justices*, 22 Pick. (Mass.) 571.

⁶⁹ *United States v. Fisher*, 2 Cranch (U. S.) 358, 386, 2 L. ed. 304; *Murray v. Gibson*, 15 How. (U. S.) 421, 14 L. ed. 755; *Jeffersonville v. Weems*, 5 Ind. 547; *Commonwealth v. Loring*, 8 Pick. (Mass.) 370.

- Rule 4. Mere grammatical and rhetorical inaccuracies are ignored when the sense is clear notwithstanding them as, for example, an erroneous use of a preposition or conjunction "and" may thus sometimes be read "or" and vice versa to maintain consistency. This must, however, be exercised with caution.⁷⁰
- Rule 5. Although it has been contended that the early English statutes were not punctuated, still it is the custom to punctuate bills, and since the printed copy is what is before the legislature there is little doubt of the validity of punctuation as an aid in ascertaining the proper meaning.⁷¹
- Rule 6. Errors of a distinctly clerical nature, when obviously so and not to the impairment of the meaning, should be ignored, but again the case must be unmistakable or the rule is not applicable.⁷²
- Rule 7. When provisions are expressed in the alternative, whatever is within any one of the disjunctively connected clauses is within the statute.⁷³
- Rule 8. When particular words of a statute are followed by general words as if after the enumeration of classes of persons or things it is added "and all others", the general words are restricted in meaning to objects of a like kind with the specified.⁷⁴
- Rule 9. When a statute intermingles generic and specific words, the effect of a divergence between the pleading and the proof is not well settled among the states, although the modern Eng-

⁷⁰ Pease v. Fish Furniture Co., 70 Ill. App. 138; Garrigus v. Parke, 39 Ind. 66; United States v. Smith, 46 Iowa 670; Stoneman v. Whaley, 9 Iowa 390; Commonwealth v. Griffin, 105 Mass. 175; Moody v. Stephenson, 1 Minn. 401; Winterfield v. Stauss, 24 Wis. 394, 406; Nazro v. Merchants Mut. Ins. Co., 14 Wis. 295, 319.

⁷¹ Randolph v. Bayue, 44 Cal. 366; Morrill v. State, 38 Wis. 428, 20 Am. Rep. 12.

⁷² Putnam v. Longley, 11 Pick. (Mass.) 487.

⁷³ Commonwealth v. Loring, 8 Pick. (Mass.) 370.

⁷⁴ State v. Stoller, 38 Iowa 321; Brooks v. Cook, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282.

lish rule is to allow the generic term to cover the specific.⁷⁵

Rule 10. The maxim that the express mention of one thing excludes all others "expressio unius est exclusio alterius" is not to be construed to imply that the omission of a thing from a statute is equivalent to the insertion of its opposite.⁷⁶

From the Viewpoint of External Relations.

Statutes are to be construed, not only to render them consistent and complete wholes, but also that such a whole shall be sound in its relationships externally to the wider systems of custom and law. Not only are the several parts of a statute integral elements of the statute, but the statute itself is also an integral part of the still larger whole of general jurisprudence. The words of the statute must be examined and tested also in connection with this wider sphere of relations. In reducing this requirement to operation it is necessary to observe that:

Rule 1. Technical words when the intent is not unmistakably otherwise should be given the technical meaning employed in the special field of use, let it be medicine, law or what not. Thus, burglary, "volt" and "fracture" mean respectively what the former is defined to mean in law, the second by physical science, and the third by medicine. Obversely, ordinary words should follow their ordinary use in society.⁷⁷

⁷⁵ In re Rouse, Hazard & Co., 91 Fed. 96; Phillips v. Christian County, 87 Ill. App. 481; Barbour v. Louisville, 83 Ky. 95, 7 Ky. L. 16; State v. Fontenot, 112 La. 628, 36 So. 630; State, ex rel. Balch v. Fry, 186 Mo. 198, 85 S. W. 328; Sandford v. King, 19 S. Dak. 334, 103 N. W. 28; State v. Hobe, 106 Wis. 411, 82 N. W. 336; Cork, &c., R. Co. v. Goode, 76 E. C. L. 826, 13 C. B. 826; Jeffries v. Evans, 115 E. C. L. 246-264, 19 C. B. (N. S.) 246-264.

⁷⁶ Burnham v. Onderdonk, 41 N. Y. 425.

⁷⁷ Robbins v. Omnibus R. Co., 32 Cal. 472; Steere v. Brownell, 124 Ill. 27, 15 N. E. 26; Merchants Bank v. Cook, 4 Pick. (Mass.) 405.

Rule 2. Words singly or in phrases are to be construed in the meaning by which they were understood at the time of enactment. The decision in the Dartmouth College case turned upon whether the charter of a private corporation should be held to be a contract or a grant. The view prevailing at the time of framing the constitution was followed.⁷⁸

Rule 3. Words are to be construed, if possible, so as to prevent the statute from being declared invalid for unconstitutionality or repugnancy, while this may conflict with an intent which is invalid, yet it supports the presumed intent that the statute should have some effect.⁷⁹

Rule 4. When a retroactive effect is reasonable, or plainly so intended, the statute should be so construed, otherwise the tendency is to avoid such an application as being somewhat abnormal.⁸⁰

Rule 5. The words of one of a series of statutes will be construed as if that statute and its predecessors in the series constitute but one statute.⁸¹

Rule 6. The words of a statute when apparently within the intent of the statute are, nevertheless, not to be construed as applying to a set of facts which the court may be convinced from its judicial experience do not come within the actual legislative intent.⁸²

Rule 7. Again, the words of a statute are to be construed in the light of pre-existing law. Such law furnishing the atmosphere from which the new law sprung, a proper understanding of the latter can not be accurately understood when isolated from its origin.⁸³

⁷⁸ *The Abbotsford*, 93 U. S. 440, 23 L. ed. 168; *United States v. Gilmore*, 8 Wall. (U. S.) 330, 19 L. ed. 396; *In re County Seat of Linn County*, 15 Kans. 500.

⁷⁹ *Bernier v. Bernier*, 147 U. S. 242, 37 L. ed. 152; *San Francisco v. Hazen*, 5 Cal. 169.

⁸⁰ *Murray v. Gibson*, 15 How. (U. S.) 421, 14 L. ed. 755; *Torrey v. Corliss*, 33 Maine 333.

⁸¹ *Attorney-General v. Brown*, 1 Wis. 513.

⁸² *Cain v. State*, 20 Tex. 355.

⁸³ *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219; *United States v. Bowen*, 100 U. S. 508, 25 L. ed. 631.

- Rule 8. In penal statutes the intent, for humane reasons, is presumed to call for a strict construction, and theoretically the presumed intent of such statutes is assumed to have been known to the legislative body and thus transformed into the actual intent.⁸⁴
- Rule 9. In like manner in remedial statutes words are to be construed liberally and the principle extends beyond the actual language to cases falling within the reason of the rule.⁸⁵
- Rule 10. When a statute which creates an offense provides a special penalty, or other special provision pertaining thereto, no other method is presumed, but if the offense was already one at common law and the statute and the common law are not repugnant all new provisions are merely cumulative and the procedure may conform to either law.⁸⁶
- Rule 11. While no exact rule can be laid down to determine when a statute is mandatory or merely directory, still whatever is not of the substance of its provisions and not in the nature of a grant of rights, is construed as directory, so also the time of performing designated official acts, when not negative, are generally directory, but negative and other words indicating a legislative intent may and often cause a statute to be construed as mandatory.⁸⁷
- Rule 12. Though in general a statute of limitations should be applied to past transactions the same as to future ones, yet a new statute should not be construed as intended to apply to any case al-

⁸⁴ *Andrews v. United States*, Fed. Cas. No. 381, 2 Story (U. S.) 202; *Commonwealth v. Keniston*, 5 Pick. (Mass.) 420.

⁸⁵ *Avery v. Groton*, 36 Conn. 304; *Perry v. Jefferson*, 94 Ill. 214.

⁸⁶ *Felix v. State*, 18 Ala. 720; *State v. Boogher*, 71 Mo. 631; *State v. Wilbur*, 1 R. I. 199, 36 Am. Dec. 245.

⁸⁷ *Webster v. French*, 12 Ill. 302; *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131; *Bowen v. Minneapolis*, 47 Minn. 115, 49 N. W. 683, 28 Am. St. 333; *Hurford v. Omaha*, 4 Nebr. 336; *In re Norwegian Street*, 81 Pa. St. 349; *Free Press Assn. v. Nichols*, 45 Vt. 7; *Wendel v. Durbin*, 26 Wis. 390.

ready barred under an old one unless express words in it so require.⁸⁸

Rule 13. A bill becomes a law only when it has gone through all the forms made necessary by the constitution to give it validity.⁸⁹

Rules of Ordinance Interpretation.

Cities regularly incorporated under the state are delegated powers of legislation over their own internal affairs. This right is construed not to violate the prohibition against the redelegation of legislative power, since such legislation is held to be only quasi-law having force merely over a restricted locality and giving way to both state and federal law in case of conflict. Accurately speaking, this form of legislation has the function of a by-law for the regulation of the internal affairs of a corporation which is political in its nature. Moreover, it is contended that the right of local self-government is the very essence of our system, and as first expressed in this country through the New England "town", is said to have actually antedated our form of state government and to constitute a common-law prescriptive right existing in the very nature of the corporation itself. The state from this view does little more than recognize and legalize this form of government as an arm of the state for certain governmental purposes without raising the obligation of a contract as in the case of a private corporation. The proper interpretation of these by-laws or ordinances, therefore, sometimes involve very intricate problems of the relation of the state and the local function as combined in the same organization.

The phrase "private statute", employed by Blackstone,

⁸⁸ Thompson v. Read, 41 Iowa 48; Pitman v. Bump, 5 Ore. 17.

⁸⁹ Walnut v. Wade, 103 U. S. 683, 26 L. ed. 526; Jones v. Hutchinson, 43 Ala. 721; People v. Highways Comm., 54 N. Y. 276; Legg v. Annapolis, 42 Md. 203; State v. Platt, 2 S. Car. 150, 16 Am. Rep. 647.

"municipal by-law" and "ordinance" are used synonymously to designate laws of this kind. Being a species of law having the full and binding force of a statute over its own jurisdiction, the general rules of interpretation governing statutes apply also in construing ordinances.⁹⁰ However, a few special observations may be added, to wit:

- Rule 1. The more special requisites of a valid ordinance are, that it be in accord with the act or charter of incorporation, be in harmony with the general statutory and common law, be for a public purpose, be reasonable and beneficial, not in restraint of trade, be not in general retroactive, and be passed by a body legally constituted, at a regularly called meeting, and in conformity with whatever mode of procedure has been prescribed by the legislature or by its own charter and by-laws.⁹¹
- Rule 2. Ordinances in the proper regulation of trade are upheld as in general are all those in the exercise of the "police power".⁹²
- Rule 3. But ordinances are generally invalid which impose excessive fines, or which provide for the punishment of felonies.⁹³
- Rule 4. In some states an offense already punishable under a general law can not by by-law be made also punishable as an offense against the municipality, but other states hold this valid. When held valid the ordinance being inferior to the statute, and being only a quasi-criminal

⁹⁰ *Pittsburgh, &c., R. Co. v. Hays*, 17 Ind. App. 261, 45 N. E. 675; *Clintonville v. Keeting*, 4 Denio (N. Y.) 341.

⁹¹ *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 275; *Burg v. Chicago, R. I. & P. R. Co.*, 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419; *Cantril v. Sainer*, 59 Iowa 26, 12 N. W. 753; *Anderson v. Wellington*, 40 Kans. 173, 19 Pac. 719, 2 L. R. A. 110, 10 Am. St. 175; *Detroit v. Ft. Wayne, &c., R. Co.*, 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79, 35 Am. St. 580. And see extensive note to 35 Am. Rep. 702.

⁹² *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857; *St. Louis v. Fitz*, 53 Mo. 582.

⁹³ *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. 310.

statute does not exclude a second punishment by the state.⁹⁴

- Rule 5. Assuming that both ordinance and statute are in force, this fact does not constitute a case where "second jeopardy" exists, for a penal action by the city is not necessarily a criminal action, and furthermore, the offense is argued to be no more an offense against the state than that the same act against a state is the same act against the United States. The better doctrine is, that the offenses are distinct and separably punishable.⁹⁵

Form and Content of Ordinances.

- Rule 1. Ordinances constitute all kinds of rules and by-laws of municipal corporations and a resolution is only a less solemn or less usual form of an ordinance, used primarily where the subject treated is of a special or temporary character, and is generally enacted with less formality, although it is no less binding in effect. Ministerial acts are usually passed by resolution.⁹⁶

- Rule 2. An ordinance should properly take the form of a statute, although this is not essential to its validity, as it is sufficient if it contains the substance of an ordinance and is properly enacted. Certain requirements as to form are usually found in charters and statutes.⁹⁷

⁹⁴ *Wragg v. Penn*, 94 Ill. 11, 34 Am. Rep. 199; *State v. Boneil*, 42 La. Ann. 1110, 8 So. 298, 10 L. R. A. 60, 21 Am. St. 413; *State v. Robitshek*, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33; *State v. Lee*, 29 Minn. 445, 13 N. W. 913; *State v. Webber*, 107 N. Car. 962, 12 S. E. 598, 22 Am. St. 920.

⁹⁵ *State v. West*, 42 Minn. 147, 43 N. W. 845; *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305; *Howe v. Plainfield*, 37 N. J. L. 145; *Byers v. Commonwealth*, 42 Pa. St. 89.

⁹⁶ *Creighton v. Manson*, 27 Cal. 613; *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190; *Citizens' Gas, &c., Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624; *Commonwealth v. Turner*, 1 Cush. (Mass.) 493; *Tipton v. Norman*, 72 Mo. 380; *Dey v. Jersey City*, 19 N. J. Eq. 412; *Blanchard v. Bissell*, 11 Ohio St. 96; *Kepner v. Commonwealth*, 40 Pa. St. 124.

⁹⁷ *Rumsey Mfg. Co. v. Schell City*, 21 Mo. App. 175.

- Rule 3. It is generally provided that the ordinance shall relate to but one subject which shall be expressed in its title. Such provisions, like those found in constitutions relating to statutes, are intended to guard against fraud and surprise and are governed by the same rules of construction.⁹⁸
- Rule 4. Constitutional provisions with reference to the title of a statute do not apply to municipal ordinances unless expressly made applicable thereto.⁹⁹
- Rule 5. An ordinance should show on its face that it was passed by a body having authority to pass it, but the absence is not fatal even when required by the charter, as the record of the passing of the ordinance is a sufficient declaration that it is the act of the council.¹
- Rule 6. A provision in an ordinance that conviction for the violation of an ordinance shall work the forfeiture of a license has recently been held illegal, although such an ordinance has been upheld without regard to this objection.²
- Rule 7. A criminal ordinance must provide for a definite penalty since this can not be left to the discretion of the court, but it is sufficiently definite if it fixes the maximum amount of the penalty.³
- Rule 8. An ordinance need not recite the authority under which it is enacted, nor recite the fact of compliance with conditions precedent to the right to enact the same.⁴

⁹⁸ *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *State v. Beverly*, 45 N. J. L. 288.

⁹⁹ *Ex parte Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. 678.

¹ *People v. Murray*, 57 Mich. 396, 24 N. W. 118; *Hawkins v. Huron*, 2 U. C. C. P. 72.

² *State v. Harris*, 50 Minn. 128, 52 N. W. 387; *State v. Rahway*, 58 N. J. L. 578, 34 Atl. 5.

³ *State v. Ocean Grove Camp Meeting Assn.*, 59 N. J. L. 110, 35 Atl. 794.

⁴ *Methodist Protestant Church v. Baltimore*, 6 Gill. (Md.) 391, 48 Am. Dec. 540; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408; *Cronin v. People*, 82 N. Y. 318, 87 Am. Rep. 564.

Relating to Mode of Enactment.

- Rule 1. When the charter provides that an ordinance must be introduced at a previous meeting it is construed to be applicable also to an act of amendment and to prohibit passage at an adjourned meeting.⁵
- Rule 2. Under a suspension of rules all provisions relating thereto must be strictly observed, and but one ordinance can be passed under such suspension.⁶
- Rule 3. A provision requiring every ordinance to be read at three different meetings before final passage is mandatory, although a reading by the title is sufficient compliance for at least one of the three meetings, while a reading may take place at a special or adjourned meeting, or a newly constituted council may give an ordinance its third reading and pass it.⁷
- Rule 4. Again, an ordinance under a statute which requires that all ordinances must be read three times and not read the third time and read on the same day it was introduced, unless the rules be suspended by a two-thirds vote, can not be repealed by a mere majority vote.⁸
- Rule 5. When an ordinance is required to be signed by the presiding officer and attested by the clerk, the omission can not be remedied by motion.⁹
- Rule 6. However, the signature of the mayor is not generally necessary to the validity of an ordinance which has been regularly passed and recorded unless required by express terms of the statute, yet a direction in a city charter that a bill shall be signed in open session is mandatory.¹⁰

⁵ Zeiler v. Central R. Co., 84 Md. 304, 35 Atl. 932, 34 L. R. A. 469; State v. Jersey City, 34 N. J. L. 429; State v. Bergen, 33 N. J. L. 39.

⁶ State v. Washington, 44 N. J. L. 605; Bloom v. Xenia, 32 Ohio St. 461.

⁷ Weill v. Kenfield, 54 Cal. 111; McGraw v. Whitson, 69 Iowa 348, 28 N. W. 632; State v. Camden, 58 N. J. L. 515.

⁸ Swindell v. State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.

⁹ Bills v. Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261.

¹⁰ Martindale v. Palmer, 52 Ind. 411; Saleno v. Neosho, 127 Mo

- Rule 7. The approval of an officer as distinguished from signing is generally made essential to the validity of an ordinance and all proceedings under an ordinance which have neither been approved nor passed over a veto are void.¹¹
- Rule 8. When an ordinance is vetoed there can be but one reconsideration, and when the charter provides that such reconsideration be at the next meeting it can not be postponed to a subsequent meeting.¹²
- Rule 9. A statute requiring legal notices and advertisements to be published in newspapers of the county has no application to city ordinances.¹³
- Rule 10. Provisions, however, relating to publication of an ordinance are strictly construed when applied to police ordinances which affect the personal rights and liberties of the citizen.¹⁴
- Rule 11. "Publication of an ordinance in the city" is complied with if the copy is set up and placed in form there, although printed elsewhere, and a "newspaper of the town" is one prepared and edited for publication in the town and having its circulation there, although printed elsewhere; but the reverse is not a valid publication.¹⁵
- Rule 12. A statute requiring publication is satisfied, although copies of the ordinance are made in connection with other proceedings of the council, and although distributed along with a proper newspaper, and although there may be inaccuracies of printing, if the meaning is clear from the context, and although it does not

627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. 653; *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. 530; *Blanchard v. Bissell*, 11 Ohio St. 96.

¹¹ *Dey v. Jersey City*, 19 N. J. Eq. 412; *People v. Schroeder*, 76 N. Y. 160; *Shaub v. Lancaster*, 156 Pa. St. 362, 26 Atl. 1067, 21 L. R. A. 691.

¹² *Peck v. Rochester*, 3 N. Y. S. 872, 18 N. Y. St. 244; *Sank v. Philadelphia*, 4 Brewst. (Pa.) 133, 8 Phila. 117.

¹³ *Pittsburgh v. Reynolds*, 48 Kans. 360, 29 Pac. 757.

¹⁴ *Elliott's Mun. Corp.* (2d ed.) p. 137.

¹⁵ *Haskell v. Bartlett*, 34 Cal. 281; *Tisdale v. Minonk*, 46 Ill. 9; *Bayer v. Hoboken*, 44 N. J. L. 131.

contain the statute which is authority for its enactment.¹⁶

Rule 13. When no time is designated, an ordinance may be published at any time, and if for a certain time before taking effect requires but one insertion, and if a series of editions are required, Sunday is included without an issue, while the date of delivery and circulation of the paper constitutes the first day of the period regardless of the date upon the paper.¹⁷

Rule 14. A mere memoranda entered on the ordinance is insufficient as a certificate when proof of publication is required to be made by certificate.¹⁸

¹⁶ Moss v. Oakland, 88 Ill. 109; Law v. People, 87 Ill. 385; Ex parte Bedell, 20 Mo. App. 125.

¹⁷ Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; Richter v. Harper, 95 Mich. 221, 54 N. W. 768; St. Paul v. Colter, 12 Minn. 41, 90 Am. Dec. 278; State v. Hardy, 7 Nebr. 377.

¹⁸ Hutchison v. Mt. Vernon, 40 Ill. App. 19.

CHAPTER VI.

ESTIMATING THE UNWRITTEN LAW.

*What is a Decision and its Effects?*¹

A decision is a final conclusion of a court of law legally constituted and acting within its jurisdiction upon a question of litigation properly instituted. The term "decision" is broadly used to include "judgment," which is the technical name given to the expression of a decision in the formal entry of the court's order in actions at law, and also to include "decree," which is the equivalent expression in action in equity. Some differences exist between the two kinds growing out of the essential contrast between law and equity, but they do not affect this discussion.

Furthermore, a decision is either final or interlocutory, but final as thus used does not refer to the finality of the conclusion reached, but merely the finality of its determination of the results according to the conclusion laid down. In some instances an estimation or computation of damages upon the basis reached must be made before an ultimate rendition can be made, and this is said to be an interlocutory decision. Both are equally final in the original sense.

Neither a Verdict nor an Opinion.

However, a decision must not be confused with either a verdict or an opinion. The former originates with a jury and is nothing more than their legalized opinion upon ques-

¹ "Judicial Precedents," 9 Harv. L. Rev. 27, Ram. Science of Legal Judgments, 13 Am. Dig. (Cent. ed.) "Courts," col. 2128, §§ 306-361; 5 Dec. Dig. "Courts," §§ 87-109; 5 Dig. Eng. Case Law "Decided Cases."

tions of fact or of mixed law and fact. A verdict in itself is not a decision and not necessarily a determination of the question, for it stands in an advisory relation to the court which still has the power to reject it if in its discretionary judgment it varies from the facts or is irregularly produced. When regular and proper the court is bound to give it effect in a decision embodying the same. Nevertheless, in common procedure, the legal effect of the jury is sometimes given the practical results of a decision in cases coming under the provision that a man shall not twice be put in jeopardy of life and limb even when no verdict has been reached. In many cases of pure law or equity no jury sits, and hence no verdict precedes the decision.

The reasons advanced in support of a decision by the court are in no sense the decision itself. Decisions may or may not be accompanied by explanations and reasoning. It is the judgment of the court and not the processes leading thereto which adjudicates the issue. The use of the word "opinion" has not been altogether consistent, sometimes having been used to designate the content of the decision rather than the grounds therefor. English and American usage of the word have varied, but generally the "opinion of the court" has meant the reasons accepted by a majority or all of the court in support of the decision. So also a "dissenting opinion" has reference to a justification of one or a minority of the tribunal for disagreeing with the decision rendered. When an opinion is expressed anonymously, it is designated "per curiam" opinion. The opinion is not law while the decision is, although the force of the latter in a precedent depends largely upon the character of the opinion attached.²

² Elliott's Work of the Advocate, ch. xi, p. 417.

The Effect of a Decision.

The normal and legal effect of a decision is to render a case "settled," or "res judicata," as it is technically called. But this status of a set of facts in law is bounded by some very strict conditions. It must be the same set of facts between the same parties or their privies in order to occupy such a position. If a decision is rendered upon a pleading it binds only the facts set out in such pleading. So also it binds only the issue raised. However, when a set of facts are res judicata they are held to be no longer cognizable in a court of law. Whether or not such a case can be reopened on a theory of error is a delicate question of equity procedure and can not be gone into in this discussion. It is obvious that as a matter of public policy there should be a limit somewhere to litigation, and hence a question once adjudicated is not easily reopened, although under the proper showing it is sometimes allowed.

The Rule of Stare Decisis.

Just as the principle of "res judicata" is designed to settle once and for all a particular question of fact, so the rule of "stare decisis" is designed to settle, in a similar manner, a particular question of law. The essential requirement is that it must not be anticipatory, but can only be established when raised in an actual case brought regularly before the court for adjudication. The rule of stare decisis is distinctly in contrast to the theory of all continental countries and their systems of law, and stands at the foundation of English and American practice. It proceeds on the doctrine that a principle of law once decided becomes imperative authority on the same question thereafter, and that the courts should follow the decision. Such a decision becomes a precedent for all future cases. The obligation to follow precedent, however, seems to

be a species of court made moral obligation rather than a compulsory legal command, for we have many instances of courts ignoring and even refusing to follow established precedents.³ On the contrary the Continental theory encourages each undivided case to be based upon an investigation of principles *de novo*. Thus, the question is a peculiar one and both systems have advantages and disadvantages. It is a problem whether either practice can be successfully isolated from the other, and whether a modified combination of both is not desirable. The relative merits of the two doctrines will be considered later.

In estimating a decision from the standpoint of authority the question of fact is at once raised as to how completely and unreservedly the decision has been accepted as a case of *stare decisis*. The whole matter in so far as it affects a particular principle or case in point is, for the practitioner, a practical quest in legal history. What have the courts actually done with the particular principle, and not what they should have done with it, is the crucial test of *stare decisis*. A case, or principle contained therein, becomes a precedent more because of the extent and character of its following than because it was originally so decided. When celebrated courts and weighty cases follow the ruling, precedent may be said to be fully established and the most learned courts in such instances are reluctant to depart from the rule. Much usage raises a presumption of soundness however illogical the reasoning may have been.

Decisions as Precedents.

Decisions are not primarily made that they may serve the future in the form of precedents, but rather to settle issues between litigants. Their use in after cases is an incidental

³ *Allen v. Flood* (1898) A. C. 7; *Quinn v. Leathern* (1901) A. C. 495.

aftermath. A decision, therefore, draws its peculiar quality of justice, soundness and profoundness from the particular facts and conditions of the case which it has presumed to adjudicate. In order therefore that this quality may be rendered with the highest measure of accuracy, it sometimes becomes necessary to expressly limit its application to the peculiar set of circumstances out of which it springs. The court may conclude that the set of facts have such an individualistic coloring, so unique as to preclude a probable, if not a possible, repetition in future cases, and yet of such singular force in the case in hand, as to demand recognition in the basis for settlement, so that the decision is fitted exclusively to the one case and is practically prohibited, if not indeed expressly so, from furnishing any expression of a general rule.⁴ Sometimes this situation is openly declared, but in others it must be deduced from the nature of the case itself so that the practitioner needs to be especially upon his guard when old principles are being applied to new circumstances, or new and novel situations are being litigated.

Moreover, precedents may be of law, of fact, or of mixed law and fact. When the issue of law is clearly distinguishable from the facts it becomes an instance of *stare decisis*, but when the issue is one of fact only, or of mixed law and fact, the courts regard the case much less seriously. The more local and particular in its features the less persuasive in force and the less known, unless of a very unusual character, while a general issue of law once determined becomes a part of the court's repository of legal knowledge. As a result, a precedent largely factual in character, is more difficult to apply, since the analogy between the cases must be shown with the greatest care and present much possibility of error in the comparison.

⁴ *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274; *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 399-402, 5 L. ed. 257; *Brisbane v. Dacres*, 5 Taunt. 144 (per Mansfield, C. J.—1813).

Theory of the Formation of Decisions from the Standpoint of the Court—As a Matter of Duty.

A court of law is instituted for a definite, imperative, public service. It is given considerable discretionary power where such power is wise, but there are boundaries of compulsion. For example, a court must render a decision when the proper antecedent conditions have been presented. Legal entanglements in the interest of public order must be adjusted. Such disturbances may be between individuals or between individuals and the state. Such a compulsory provision, when systematically and promptly carried out, tends to obviate violence.

But the function of the court, theoretically conceived, is limited to applying the law. It administers and interprets rules of law made and provided by others. Much of its very method of procedure is laid down for it to follow. However, the question arises in practice as to the duty and power of the court when an obligation to decide a case coexists with no definite rule of law to apply. Such situations are not uncommon. In this emergency the court feels bound to dispose of the case, and following the general rule of reason, that when a power is given it necessarily implies the additional power to supply an adequate means to carry it into effect, does not hesitate to supply the deficiency by a species of court-made law already mentioned. As a matter of expediency, so long as no express legislation is passed upon the question thus determined, the court will thereafter search for such precedents to govern in similar instances. Only in this manner can an orderly consistency among decisions be maintained.

Matter of Antecedents.

Realizing it to be a part of its duty to decide all actual cases brought before it, whether there be existing law ca-

pable of application or not, the court may well ask what are to be the antecedents to this decision? May a decision be made without reasons governing or a principle of logic, equity, or of ethics controlling? If there be law, written or unwritten, the answer is plain—the law must be discovered and applied. But suppose the contrary situation exists. Until the court adopts some principle and embodies it in the decision it has no claim to be considered even court-made law. However, the general spirit of law would seem to repudiate the idea of a decision without a principle underlying of any kind, that is, a purely arbitrary fiat. Such a procedure would reduce justice to a problem of chance. Yet there are decisions on record to which no principle or reason is attached, and which seem to approach very near to such a condition. Of course a decision is no less a decision in its binding force upon the parties in dispute, however arbitrary it may be, but it should obviously have little or no force as a precedent, and this in some instances may be exactly the effect which the court desired. As a matter of truth, however, it may be presumed that a court does not feel itself under obligation to sweep the fields of science, ethics or philosophy exhaustively to supply itself with a principle closely fitted to a peculiar set of circumstances in order to justify itself for purposes of a precedent. In some few cases, no doubt, concrete justice may be administered more satisfactorily than it can be expressed, and in such emergency the court is no doubt inclined to leave their reasons unanalyzed and undefined. Nevertheless, the exception which is wisely unexplained, only emphasizes the rule that a well-ordered decision demands a foundation in reason and general principle.

The Civil-Law Doctrine.

Granting now that according to public policy the court must, when possible, use a general principle as a basis for

the decision, a further question arises as to how it shall get such a principle. Is the court now fully at liberty to pursue its own method, or is it bound to a particular method? On this proposition the continental systems of law derived from the civil law of Rome fundamentally diverge from the English and American systems. The former hold that the court is free to investigate the case *de novo*. That the interest of progress and a learned jurisprudence demands that not only shall the court be unbound by precedents, but that each case deserves a fresh and unprejudiced application of the law, and that the court should do more than merely examine into the applicability of a given precedent, and should again canvass the original grounds. Such a view does not preclude a consideration of adjudicated cases, but denies that the influence exerted by them should be more than a persuasive one. There is no doubt that this system would demand and hence tend to produce a very learned judiciary and give a very elastic medium of adaptation to progressive changes, but on the other hand would apparently, if carried out strictly, result in an enormous waste of energy. But these results do not occur simply because if the precedents are once made they become unconsciously part and parcel of the jurist's knowledge and inevitably work out their effect upon subsequent decisions. Practically, therefore, in operation this method tends toward the opposite theory, for the knowledge of the court that a question of law has been often and by numerous courts decided in a certain way, will produce such a degree of persuasive authority that the actual effect between persuasive and imperative authority is almost indistinguishable.

The Common-Law Doctrine.

On the other hand, the peculiar nature of the unwritten common law, in contrast to a system of statutory provi-

sions, made, in the beginning of English law, the precedent a fundamental, a *sine qui non* of the system. Somewhere and somehow the customs having the characteristics of law must be formulated. If not by legislative enactment then through the instrumentality of court decisions. Once formulated, the courts were bound by imperative authority to follow the ruling in cases involving an identical set of facts. To be sure as to whether the case presented a similar set of facts must always remain an open question for the consideration of the judge. Let it be noted as well that a refusal to follow precedent resulted quite differently under the two great systems. In civil law it meant simply that some other statute or possibly the same statute, but for other reasons, would be applied and the effect was no more than an application of already existing law, but under the common law to refuse to follow precedent meant the formulation of a new law, for we remember that with this system decisions themselves have the force of statutes. Obviously, therefore, unless a chaotic multiplicity of laws should spring up, it became itself a preventive necessity of the system, that precedent must be followed when justly applicable. However, as a check upon too great a rigidity, the doctrine in its actual operation did not preclude a challenge against the soundness of the original decision as a misstatement of the law and a possible divergence on good grounds, for the common law proceeded upon the idea that a principle of human conduct was law even before embodied in a decision. The courts and parliament were presumed merely to give expression and sanction to the law. Of course later developments in life have necessitated much new law not traceable to ancient custom.

In America, although we recognize and follow the common law in cases not covered by statute or if not forbidden by statute, still the common law which we enforce is that only which has become embodied in precedents. We have no common law originating in customs indigenous to our coun-

try; ours is an inherited common law. With us, therefore, precedent is not so fundamental and imperative as it is in England. But while the courts of our country refuse to be bound even in some instances by the rulings of a superior court, still precedents are uniformly followed. However in the face of the multiplicity of decisions and jurisdictions the attention of the court is forced more and more to a reconsideration of the theory of the law, so that the actual working of this system tends to approach the civil law point of view. Thus it appears that the two systems are not after all so far apart in the results reached as might be entertained from the abstract principles.

The Right of Judicial Comment.

Courts having been established to constitute a final authority upon questions of legal right and wrong, it follows that their prerogatives and duties are jealously guarded to conserve such an exalted service. From ancient times the element of permanency and removal from the contingency of uncertainty of remuneration has been conceded to be essential to the proper exercise of the function. So also it has been considered wise to free the tribunal mind, as far as possible, from the fluctuating and capricious influence of public sentiment and passion. Conversely, the corroding of selfish private interests has been a source of insidious danger. The celebrated instance of judicial malpractice during the reign of Edward II, when that monarch proceeded to chastise the judges so severely for their professional dishonor, and which resulted in fastening upon the law of procedure an excessive and burdensome degree of technicality, is well remembered.

Our American courts, at least until very recent times, have enjoyed great distinction and a reputation for learning and honor above reproach. Considerable adverse public criticism

has, however, been directed lately against the encroachment of corporate money interests upon the judicial function, and the principle of "recall" is advocated by some as an effective remedy, but the profession itself views with apprehension anything which might tend to render the judiciary less fearless and dispassionate in their work. It may fairly be said that the lawyer in estimating a decision does not often find its value depreciated for such reasons. Then, too, a court would be extremely reluctant to reject the full value of a precedent upon grounds indirectly impeaching the honor of the bench which they naturally and properly cherish. For this reason the point of view of the court itself is highly important to the legal profession.

Since the courts are called upon continuously to consider and apply precedents, it follows that whatever operates to facilitate and render accurate the process is not only acceptable, but also highly desirable by the bench itself. It therefore reserves to itself the right of appending comment and discussion to a decision. No sound argument could well be advanced against a practice which renders a decision from an opaque official act to an enlightened exercise of legal acumen and reasoning. Whatever is legally sound is so for reasons and the reasons become invaluable data which far from retarding further legal investigation ought and do stimulate it. Generally speaking, the court keeps the work on a high open plane of logical consistency, and apparently enjoys the distinction of being expected and capable of discoursing learnedly upon the fundamental principles of the law. The able opinions of Chief Justice Marshall have become renowned for their influence in shaping the destinies of our republic. The announcing of an opinion is, therefore, not merely a privilege on the one hand, nor an extrajudicial performance upon the other, but a form of quasijudicial duty. Nevertheless it is not a strictly legal obligation, for unless there be a constitutional requirement the court, even in deciding a

litigated case, may decline to follow a statute which commands an opinion.⁵

As already mentioned the court, in the exercise of a wise discretion, may conclude that a case of unique local coloring must be decided upon considerations of such a refined and extra legal, ethical, psychological or sociological nature that any attempt to formulate them in such a shape as to be separable from the particular ensemble of facts would be fruitful of pernicious misunderstanding and hence worse than valueless. It being generally admitted also that decisions should not only take into consideration the past, but the present needs and outlook of society, such sociological aspect does not always yield itself to precise formulation, however necessary and imperative the need for such a factor in the determination of legal questions may be. Therefore where the reasons underlying a decision repose in the peculiar nature of the facts themselves or within the broad field of general welfare, the court may well refrain from entering into a philosophical justification.

It is an interesting observation that in early times in England, before the days when reports were reduced to writing by the court, that the judges delivered themselves orally of the most elaborate and learned opinions. The strong practical reason that unless a court make public its grounds for a decision there might grow up a body of law based upon no principles, or if governed by principles, left to be understood with much difficulty when once the facts had become obscured by time, evidently appealed to the judges of those days, for we learn from the writings of Edmund Burke as follows:

"Your committee do not find any positive law which binds the judges to give a reasoned opinion from the bench in support of their judgment. The judges in their reasonings have always been used to observe on the arguments em-

⁵ *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

ployed by the counsel on either side and on the authorities cited by them. The English jurisprudence has not any other sure foundation, nor, consequently, the lives and property of the subject any sure hold, but in the maxims, rules and principles and traditionary line of decisions contained in the notes taken, and from time to time published (mostly under the sanction of the judges) called Reports. . . . The elementary treatises of law, and the dogmatical treatises of English jurisprudence, whether they appear under the name of 'Institutes,' 'Digest,' 'Code' or 'Commentaries,' do not rest on the authority of the supreme power, like the books called the Institute, Digest, Code and authoritative collation of the Roman law. With us doctrinal books of that description have little or no authority, other than as they are supported by the adjudicated cases and reasons given at one time or another from the bench, and to these they constantly refer. . . . To give judgment privately is to put an end to reports, and to put an end to reports is to put an end to the law of England. Nothing better could be devised by human wisdom than argued judgments, publicly delivered, for preserving unbroken the great traditionary body of the law, and for marking, whilst that great body remained unaltered, every variation in the application and the construction of particular parts."⁶

Anticipated Questions.

Our system of government which divides its functions into three distinct kinds and forbids any encroachment of the power of one into the realm of another, essentially forbids the judiciary from exercising legislative power. But when the proper exercise of its own function results in a form of quasi-legislation there can be no claim of an abuse of power. Such incidental lawmaking is apparently inevitable, but fur-

⁶ In *re Lord's Journals*, 11 *Burke's Works* (Boston ed.) 1, 41-45.

nishes, therefore, no excuse for any extension of the power outside of the strict limits imposed in the deciding of actual cases. Now and then the courts have been tempted to cross the line, but to their credit they have usually refused to give opinions relating to spurious cases. When importuned to anticipate a situation and thus avoid improper legislation they have steadfastly stood upon their right of refusal. And very early in our history, during the presidential term of Washington, the Supreme Court of the United States, on the ground that the constitution imposed no such a duty upon the judiciary, declined to consider questions propounded to it by the President and his cabinet.⁷ Of course, when the constitution of a state provides for answers by judges in reply to interrogatories made by state departments, it is their duty to comply;⁸ but such a provision has been construed to relate rather to legal advice than matter of authority, and neither the courts nor the departments themselves feel thereafter bound to follow the instructions thus given. It is evident that theoretical or hypothetical cases at best would hardly be more than skeletons of cases, so impossible is it to prophesy the exact turn of events, and like many of the best laid plans of mice and men such issues would undoubtedly often fail to materialize. Nor does the settlement of an amicable dispute involve an exception, for an undecided issue is no less real because the parties thereto are not filled with an acrimonious hostility.

Value of a Decision from the Standpoint of the Practitioner
—Results of Use.

A past case for the purpose of the practitioner is material for argument, no more and no less from a practical standpoint. The theoretical interest which it may stimulate is a

⁷ Thayer's Legal Essays, 42n, 54n.

⁸ In re Application of Senate, 10 Minn. 78.

by-product. In estimating its value he always has in mind a particular use. He asks himself, "What can be done with this case in support or overthrow of a particular proposition?" And so, as already stated, it is important to know what the reputation and history of the particular case is. The weight given to the internal, if it may be so expressed, excellencies of the case will, psychologically speaking, vary with its reputation as a precedent. In other words, the greater its celebrity in use the less attention will be directed to the grounds for such use. A new precedent, therefore, however admirable it may be in its features, will have the smallest self-supporting force, while a poorly reasoned case which has become widely used will have an argumentative power out of all proportion to its actual merits. The rule giving a precedent imperative authority is responsible in this way for some bad law, and a precedent, once having acquired a common use, becomes correspondingly fortified against correction. Presumption of correctness grows steadily in its favor. Thus an attorney, both to effectively use the same or to combat its use by the opposition, needs to ascertain very carefully the extensiveness of its citation and the importance of the cases where used, both as to their reputation and subject-matter, and as to the celebrity of the courts recognizing them.

Practitioner-Made Law.

While court-made law is generally recognized as an admitted fact, yet the equally important fact that the profession is able and does constantly make law is not so well appreciated. If the precedent becomes law when used and becomes actually effete when not used, the conclusion is clear that in so far as the practitioner can and does control the application of a principle to that extent he makes or unmakes the law of the land. We are not now referring to

nominal law, but to active law. There must naturally follow in a system based upon precedent, and where different jurisdictions professedly follow their own decisions, a peculiar survival of the fittest among precedents, and the feature already pointed out that marks a case as the fittest is often the fact of survival itself. Who then, is responsible for the survival of a case? Presumably the court itself, but since the courts often rely upon the authorities cited by the counsel employed, and sometimes refuse to supply their own authority, the consequence is that the profession wields a tremendous influence upon the history of a case. For example, a decision for certain reasons may be unpopular with the profession, and hence is ignored whenever possible until by a gradual decadence of reference thereto it sinks into oblivion; or a case having no especial claim of conspicuousness eventually acquires the mustiness of the obsolete and is stamped by the profession as "not law." On the other hand, a case may find high favor with the practitioner and be so frequently brought to the front that it becomes established by very virtue of its repetition. Like a much advertised nostrum an incessant hammering around the fringe of attention is bound to leave a deposit of assumed value. Such a process as a whole is an undirected and unpremeditated sociological and psychological phenomena, but it results none the less in legal consequences.

Result of Conflicting Decisions.

A system based upon precedent and emphasizing the imperative authority of the same must still find some escape from abject formality and the resulting fixation of mistake and error. The system recognizes that old landmarks sometimes need to be abandoned or adjusted to new conditions and that new decisions should often bear double inspection. Thus it is not a criminal act to refuse subservience to a

decision and the law provides for a liberal right of appeal from a lower to a higher court within proper limitations. The practitioner needs, therefore, to investigate whether:

1. A decision in a court of first resort or by an intermediary court has not been revised, modified or reversed by a higher court.

2. Or a decision by a court of last resort has not been modified or reversed upon a rehearing, a procedure of not unusual occurrence.

3. Or, finally, whether a lower court has refused to be bound by the rulings of a superior court, which position is sometimes even justified when the evidences of blunder are so manifest as to challenge reasonable dispute, but otherwise is held to be improper.

The above conditions, however, relate to the original launching of a decision and may be said to be a part of the primary action, although a bill in equity will sometimes lie to open up a settled question for purposes of reinspection. But what of cases which have passed into the stage of legal finality? What recourse, if any, still exists to disturb the status of such a case? In answer to this the practitioner must bear in mind the following facts:

That such a doctrine may be said to be impregnable where it has been applied in many cases as the "*ratio decidendi*" of the decisions, approved by *dicta* in others, and its scope even extended beyond its original confines, but that, on the other hand, fundamental as the authority of precedent is supposed to be, a curious exception exists in favor of a court in relation to its own decisions. In fact, it is deemed to be the duty of the court to overrule its own decisions when they are manifestly not in accord with the principles of an enlightened and progressive jurisprudence. The relaxation of so important a rule is probably not placed upon the ground that error in one place is not as serious as in another, but because there are reasons why a court may be privileged

to correct its own mistakes with less danger than to permit others to do so. In the first place, the court which makes the wrong decision, on account of its familiarity with the position taken, is better able to appreciate its fallacy, and in the second place, no court will voluntarily advertise its own error except upon motives and convictions of the highest order. There seems to be much to gain in allowing some legalized method of discarding bad precedents, and for the court to be entitled to perfect its own record gives a greatly needed check upon a too fixed servility to form lurking in the system. Little apprehension need be felt of an abuse in this direction for an exercise of this power in a few instances, which would redound to the high conception of the court, would, if repeated frequently, expose a quality of superficiality and uncertainty quite as derogatory to the esteem and reputation of that body. The arguments which could be advanced in favor of this exception are, however, not further applicable. To allow courts to reverse other rulings than their own at option would amount to a destruction of the system. There would be no especial fitness, no prompting nor restraining sense of honor to preserve value, but an open field for recklessness and unworthy motive to develop. All this, to be sure, would be avoided where no precedent exists to be overruled and the principle of initiative deliberation is emphasized as in the Roman system. With the American system a compromise between the obligation to follow precedent and the freedom to overrule the same could not well be maintained beyond the exception already noted. No little difficulty is encountered by the practitioner in the use of precedents to know, in some instances, the standing of a case. Especially is this true if the attorney happens to be unfamiliar with the local practice in which he is to bring his case. Nothing but a close scrutiny of the legal reports as they come out will give the information concerning the drift of opinion, and even then the fact that

a previous decision is being overruled is not always obvious for the process is not always heralded from the legal house-tops. Nor does the current of contemporaneous decision apprise one of the status of past legal decisions, and yet there is no defeat more certain nor embarrassing to an advocate than to find himself overruled by a later decision.

But to make matters still worse for the practitioner, there are other ways of overruling a decision than an open and express avowal of the same. The lawyer, as we have seen, may find a negative silent way to avert the effects of a decision while the courts are not always clear in their intentions on the matter. However, the attorney must not blunder in his estimate of the situation. He at least must be explicit in his use of a case. The following conditions may present themselves:

1. A subsequent decision may silently controvert a previous case either rendered by the same court or by an inferior court within its own jurisdiction, and confusion results, as to whether an error is to be credited to the former or a mistake to the latter, or whether in either contingency the latter is not to be judged authority.

2. A decision may have been subsequently expressly criticised or disapproved by the same or a higher court in some case not involving directly the same principle, and although such a proceeding does not overrule the decision, amounting only to dictum, still the effect is to presage such an outcome and to leave the case in a position of weakened and doubtful authority.

3. As already pointed out the attitude of the profession itself may have cast a cloud over the argumentative force of a decision which has been uniformly ignored in citation and has so far outlawed the case in the mind of the court that it is likely to be reversed at any time.

4. Frequently the scope of application of a former decision is synecopated in its application to a later case or through

such restriction is denied applicability in a succeeding case, the result in either instance being to partially overrule the precedent and reduce it to an instrumentality demanding thereafter the closest scrutiny. By this means a court may effectually in more closely defining a precedent's limitations correct the same without ostentatiously parading its defects. It is a method often employed and naturally enough implies that to confine a case to its proper limits is not to overrule it, but merely more logically and consistently define it. Of course to determine where definition ends and overruling begins is a problem left to the risk of the practitioner.

Conditions Affecting Construction—Jurisdictional Relations.

An important consideration in estimating the force of a decision is that of the relation of the two courts together in rendering the decisions. If both courts are within the same jurisdiction and are co-ordinate in rank, the decisions of one have merely persuasive authority over the other, but if one is superior to the other in rank the ruling of the lower court is of persuasive authority to the higher, while the decisions of the latter are of imperative authority over the former. Such difference of authority is not based as a matter of fact upon any actual disparity of legal ability between higher and lower courts, for while presumptively, the higher the court the more select the judges,—political factors sometimes enter into the selection,—while on the other hand many capable men find positions at some time or another in their career upon the lower benches.

Again, if the courts are of different jurisdictions, the following situations arise:

1. The decisions of the Supreme Court of the United States on questions arising under the United States Constitution, the treaties of the United States or the federal statutes are of supreme and imperative authority over all in-

ferior courts; but upon questions of state law the relation is one of but merely persuasive authority both ways. The authority of the state courts of the highest rank is supreme within their own borders over all other courts within the jurisdiction. The United States Supreme Court, however, within its own jurisdiction remains free to follow or to ignore such decisions. So far the practice of the United States Supreme Court has been to give effect to the decisions of state courts whenever possible, even when not entirely approving the same. Within their own jurisdiction the federal courts reserve their prerogative to disregard state rulings when in their discretion they consider them to have been wrongly interpreted state law. They do this on the ground sometimes advanced that the jurisdiction of the federal courts is determined not so much by federal questions as by local citizenship, and hence a local supremacy is implied. While they follow the state upon constitutional interpretations and general statute laws, they do not hesitate to act independently upon questions of commercial law.⁹

2. The decisions of the courts of one state have no more than persuasive authority over those of another state. But as between the comparative influence of the opinions of the courts of the various states some rank very high, while others are seldom quoted. Decisions from the states of New York, Massachusetts, Illinois and California constitute examples of states whose decisions have attained the maximum persuasive authority in other states.

3. Sometimes a court is established for a limited time only, or over a limited field, or with powers which have not been very definitely defined. The court may in some instances be denominated a commission which seems to imply an organization of a character not entirely judiciary. Nevertheless, within its own powers, the decisions of such a

⁹ *Western Union Tel. Co. v. Car Pub. Co.*, 181 U. S. 92, 45 L. ed. 765; *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 27 L. ed. 359.

court are apparently final. Decisions rendered under such conditions are no doubt in practice under-rated in value unless as sometimes happens men of well known ability along the particular line and in legal lore are members of the tribunal.

4. Finally, we have for consideration the famous array of English cases. Of course they can never be more than of persuasive authority, but certainly of a very exalted kind. The ability and thoroughness of the English courts have never been questioned. Since our adoption of the common law to supplement legislation, our relation to the English decisions has always been intimate and fruitful. There were few cases of litigation among the American colonies reported before the era of independence, and hence the line of common-law precedents, to which we refer, are almost wholly of English soil.

Case Conditions.

The value of a case as a precedent may be affected by numerous circumstances, and the attorney must be alive to the possibilities of these for argumentative purposes when the authorities in point happen to be few in number. These conditions may weaken the force of a precedent although it be right, or strengthen its weight although it be wrong. In other words, they are not conclusive upon the point of correctness constituting evidence only. Among these factors may be found the following antecedent conditions:

1. That there was not a full court sitting when the case was being heard. For several reasons one or more of the judges may have been temporarily absent, and it may from previous records be inferred that these judges would not at least have concurred in the decision

2. The case may have been one of such a political cast that the court may have been divided according to party

principles, and the inference is then so strong that bias has entered into the result, that its influence is greatly impaired. or an analagous situation may develop where great financial interests are at stake. A decision which seems to the popular mind to favor corporate interests is almost certain to draw upon itself undeservedly, or not, a public denunciation. Some of this reproach inevitably tends to weaken a case even with a most conservative bench.

3. The court may have been hurried or burdened with a large accumulation of business which often occurs much to the obstruction of exhaustive treatment and deliberation.

4. The question involved may have never before come before the courts and a new problem, particularly if it be of a complicated nature, not infrequently involves consequences which time only can reveal, and hence assumes but a tentative acceptance in the public mind.

5. The action may be of a purely amicable character and with not enough contention to give the principle in issue a severe enough catechism to expose and eliminate error; or the point ruled on may not have been made and discussed by counsel.¹⁰

Conditions Attending the Disposal of the Case.

1. The decision may be no more than a bare statement of the judgment unattended with either argument or opinion so that the question must not have been considered seriously.

2. The argument may be defective in scope, that is, either be upon one side only, or may not cover fully the principle upon which the decision rests, or may have put too little stress upon the point in question, referring the decision to rest more easily upon another point, or actually omitting the point, place the decision upon other grounds, or may not

¹⁰ *People v. Brooklyn*, 9 Barb. (N. Y.) 535, 544; *Larson v. First Nat. Bank*, 66 Nebr. 595, 192 N. W. 729.

substantiate its conclusions by noticing the existing authorities. In any of these conditions an apparent lack of thoroughness seriously impairs if it does not destroy the value of the decision as a precedent. It is never safe to assume that something was meant when not expressed.

3. There may be indications that the court was itself dissatisfied with the decision, for there may be a notice of one or more judges dissenting sometimes accompanied with reasons therefor, or there may be an evenly divided court, so that there results what is known as an affirmance by necessity, in which event the weight of the decision is reduced to zero, or the opinion may be anonymous, which is almost certain to suggest that no judge considers it of any credit to himself to have his name attached thereto. Cases of such a character may be of little use when these facts are known. But a *per curiam* opinion is said to be one in which the case is so clear as to need no extended discussion, and to have the same weight as any other opinion.¹¹

4. There may have been a unanimous decision, but a wide difference of opinion by the several judges in the adoption of the result. In some cases these differences may be strongly emphasized so that the case is diverse at every point except that of the conclusion reached. It is evident here that as a mere discussion decision it seems to be weak from the very abundant grounds upon which it may stand, but upon which there is no agreement. If the judges merely prefer their own grounds, the case may be strengthened by such diversity, but when they discountenance all other grounds than their own, the effect is to destroy each other. Of course some harmony may exist, but the presence of so much disagreement makes the use of such a case extremely unsatisfactory.

¹¹ *Merchants Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56, 64; *Clark v. Western Assur. Co.*, 146 Pa. St. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. 821.

Surplusage Support of a Decision.

Not infrequently the situation occurs in which more than one ground exists equally sufficient upon which the court may base a reversal of the decision. These grounds may be recognized by the court, but one only may be selected for its purpose. The question immediately arises as to whether such selection excludes the right to consider the remaining grounds imperative authority also. Admittedly the court is under no compulsion to found its decision upon more than one ground. The danger no doubt in the position, that all the grounds are equally authoritative, will lie in the clearness with which the court is shown to have examined and admitted the adequacy of the particular ground. The mere fact that one ground is not the only sufficient one, nor the one selected, does not, if the court expressly recognizes such sufficiency, prevent it at least from having persuasive authority, and if such recognition can be construed to amount to a practical basing of the case to some extent thereon, to that extent it may have imperative authority. The court is at liberty to base its decision upon a number of grounds if it so chooses, or upon the case as a whole, and if so, the weight of the decision can not be said to rest exclusively upon any particular one. Each must be estimated separately.

Surplusage Antagonizing a Decision.

When a decision is rendered there may be more points decided than are necessary to the general ruling of reversal or affirmance of the lower court. Thus, when two or more errors are alleged, one or more may be found true and one or more false. To find an allegation of error correct is enough to reverse the decision, while conversely to sustain will require the denial of all. But are the additional findings which refute certain allegations of error and in so far sustain

the lower court, of no imperative authority, or is such matter merely dictum because they are unnecessary to the decision found? It has sometimes been so argued, but if it be remembered that had one of these been first considered and been found to be an error, it would unquestionably have been of imperative authority, for it would have been the basis of the decision and the argument thus loses force. It inevitably follows that a finding which is imperative authority, when it points one way, would be equally imperative if it points another. What makes it authority is not which way it points, but whether it was an issue germane to the question of reversing the lower decision.¹²

When the Decision is a Compound.

It is obvious that it requires a more complete discussion to sustain a decision than to reverse one, for any one of several errors may be sufficient to justify the latter and no further consideration is compelled; but to sustain the same decision would exact a complete review of all the errors in question. However, an affirmation of the lower court does not always imply that there has been no error. Sometimes it occurs that two errors result in cancelling each other in effect so that they compound into nothing objectionable. Usually the court considers only such errors as counsel have pointed out, and the arguments which they have presented, but they are free to investigate and supply other matter when they deem it advisable. Thus decisions may be compounded not upon points taken isolatedly, but upon the composite effect of all taken together. Such cases are, however, relatively rare, and are of little or no value as precedents for no parallel set of circumstances is likely to arise.

¹² *School Dist. v. Stocker*, 42 N. J. L. 115; *Kirby v. Boyette*, 118 N. Car. 244, 24 S. E. 18; *Bates v. Taylor*, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316; *Allen v. Flood*, L. R. (1898) A. C. 1.

Where Discussion is Elaborate.

Any discussion by the court in connection with a decision may be assumed to be of some value, but the kind and degree of value must be estimated with the greatest care. The value which the practitioner is usually seeking is the value which the ratio decidendi of the case possesses as a precedent. This value is that of imperative authority in similar cases to follow. However, different cases, although imperative, are not equally clear, comprehensive nor emphatic upon the principle which they set forth. They therefore differ in this way in their usefulness as legal authority. But there may be other material contained therein having value of another kind, known as persuasive authority. This material is not essential to the ratio decidendi of the case, but incidental thereto. For example, in the case of *McKyring v. Bull*,¹³ the court gives an historical account of the action of assumpsit. The material is given to elucidate the principle in the case, but it was not necessary to the decision. Many of the most important cases have much of this material "side lights." The range of discussion in a case may and often does vary thus from the utterances of the decision, or ratio decidendi itself, to mere observational dictum.¹⁴ Between these two extremes of value, as well as kinds of value, there may be various gradations of material and worth. Thus from matter of a purely historical and theoretical nature incidental to the main issue, and hence relevant but not material, there may be opinion which is material but not essential to the decision, setting forth the reasons upon which the decision is based, and therefore having persuasive authority. Further still, some of this opinion may be a more elaborate statement of the doctrine of the decision than the ratio deci-

¹³ 16 N. Y. 297.

¹⁴ *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842; *Griffith v. Fowler*, 18 Vt. 390; *Chase v. Westmore*, 5 Mees. & S. 180; *Eicholz v. Bannister*, 17 C. B. (N. S.) 708.

dendi necessitates, but expressing the principle more fully, and hence is entitled to the weight of imperative authority along with that of the naked decision itself.

A great deal of value attaches to incidental discussion by the court in revealing the conception of learned jurists upon legal distinctions associated with the case and thereby directing the profession to a proper understanding of the kind of treatment to expect upon these questions in the future, or to a corroboration or supplementation of the same principle in some other case. It follows from this practice that a principle established in one case will be found to be gradually developed by dicta in succeeding cases. The law in case precedents, therefore, is a gradually unfolding process until, if such be possible, a principle is finally rounded out from many tangential points of view. For these reasons it is obvious that dicta, obiter dicta, obiter, semble, opinion or whatever term be applied to explanatory or expositional matter given by the court in conjunction with a decision is not only very acceptable to the profession, but of the highest importance to a masterly jurisprudence.

The Risk of Broad Language.

In like way to all legal documents expressive of the law the rules of interpretation governing statutes, wills, contracts, etc., apply in a general way to the estimation of decisions. It is not always easy to separate dictum from law. Especially is it difficult to ascertain to what extent the facts in the case are binding upon the language employed. Not infrequently the statements are not commensurate with their own applicability. They read like statements universalizing some principle when in truth they are intended to express something peculiar to the case. Considerable difficulty is always experienced in so expressing an idea that the language implies no more and no less than just what is in-

tended. In law this overlapping of the extent of the doctrine by the extent of the statement is a pernicious source of error. And particularly is the habit of many practitioners in selecting isolated statements from a decision in support of a contention, when as a matter of fact the context as a whole considerably modifies such expression. Facts of a peculiar coloring, sui generis in their nature, generally falling outside of the pale of any ordinary disposal, but demanding settlement, must either draw in a constrained way some principle to themselves or initiate a new rule. The court may be loath to do either, and when compelled to may limit the decision expressly to the particular set of facts. When it does this there results no danger, but the trouble lies in some cases when the coloring is not so pronounced and perchance affects only a part of the case, then it occurs that the language more often outruns the intent. Of course such excess is mere dicta and of persuasive authority only, while in proportion as the coloring was the reason for the decision and that coloring was extremely unique to that degree it loses all value whatever.¹⁵

Where a Conflict of Laws is Involved.

It often happens that cases come before the courts involving foreign elements, and in which there arises a conflict of laws. Since statutes are primarily made with reference to domestic conditions and do not often in terms apply to matters involving foreign elements, and still other cases occur in which the domestic law is unwritten, it follows that the application of the law becomes a difficult matter.

In general every point that may come up before a court for a decision must have a "situs" somewhere, and each point will in general be governed by the law of the state

¹⁵ *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 5 L. ed. 257; *Linstroth Wagon Co. v. Ballew*, 149 Fed. 950, 8 L. R. A. (N. S.) 1204; *Quinn v. Leathern* (1901) A. C. 495.

where that "situs" is ascertained to exist. This rule is the exercise of the principle of comity, which is neither an absolute obligation nor a mere act of courtesy, but a recognition of the demands of justice and enlightened policy. However, it is obvious that where cases may involve several distinct foreign elements distributed among three or more states, that there should be what Minor in his *Conflict of Laws* denominates the proper law to be enforced. But whatever rules are adopted in adjusting the various combinations of elements which may arise, there are five exceptions which are uniformly made to the enforcement of foreign law. As the authority mentioned says:¹⁶ "If the court says as much in plain terms, naming the exception to which it belongs, and giving its reasons for believing it to be one of the exceptional cases, no confusion of the *lex fori* with the proper law is apt to arise; but frequently the courts fail to make the distinction, merely holding that the case is governed by the law of their own state, without even specifically designating it the *lex fori*; and sometimes treating it as the enforcement of the proper law, instead of a law substituted for the proper law; sometimes confusing terms, as in cases of foreign transactions relating to personalty situated in the forum where they designate the substituted law as the *lex situs* rather than the *lex fori*, in which aspect it should be considered, as we have seen. The consequence of all this confusion is, of course, that false impressions are created as to the law really looked to by the court as ruling the particular case, and still more with respect to the proper law which should rule similar instances where circumstances creating the exceptional cases are not present. This has been a most fruitful source of confusion and error. Some hints, therefore, drawn from experience, touching the points to be looked to in attaching the proper weight to authorities in these investigations will not be amiss," lest unnoticed it may result that

¹⁶ Minor's *Conflict of Laws*, § 16.

decisions will be cited to sustain propositions which in reality they do not sustain.

"1. In distinguishing the various conflicting cases, care must be taken in the first place to observe in what state the suit is brought, for the determination of the governing law in a given case will often depend upon which state is the forum.

"2. This point must be observed as well with respect to federal courts sitting in a state to enforce its laws, as with regard to the state courts.

"3. After ascertaining and carefully noting which state is the forum, observation should next be directed to the facts of the case. If such as to constitute one of the exceptions, the decision will in general be of little direct authority with respect to the proper law governing such transactions. It is only a direct authority for the application of the *lex fori* in the case of the particular exception disclosed by the facts of that particular case. The rest is dictum, more or less valuable.

"4. If the facts of the case under investigation do not disclose an instance of the operation of any of these exceptions, the decision is a direct authority, more or less valuable, touching the proper law.

"5. If there be disclosed ground for the operation of one of the exceptions, but the court enforces a foreign law (not the *lex fori*), the decision is direct authority of a very strong kind to show that the foreign law thus enforced is the proper law.

"6. The weight to be attached to a particular decision will depend, as in other cases, upon the character of the court, the care bestowed upon the opinion, whether it is decision or merely dictum, its date, the particular facts or statutes in the case, etc.

"7. In examining the facts of the case, care must always be taken to note the nature of the transaction in detail, to

observe what are the various foreign elements that enter into the case, which of these are given weight in the decision and which are discarded. Many different combinations of these elements may arise, and each combination may cause a change in the result. It is of the utmost importance, therefore, to note what combination of foreign elements exists in a particular case, and whether the court had before it the whole combination, in making its decision, or only one or more of the foreign elements. The value of the decision will in large measure depend upon this."¹⁷

Conditions Inherent in Reporting.

The medium through which the decision and discussion of the court reaches the practitioner is of serious import. Good law in the making may have become very bad law in the reporting, for the reporting of cases is indispensable for purposes of record, and it is to the records that the laws and courts must turn. Important as the matter of making a proper record unquestionably is, far less accuracy has been achieved in this respect than would seem to have been probable. In England from the earliest times the practice has been for the judges to deliver their decisions and discussions orally in open court, often without notes, thus rendering the most elaborate and learned opinions in the earlier period without leaving behind a written copy or authoritative notes. To take accurate and adequate memoranda while listening to such an intricate maze of legal lore and argument and then afterwards to be able to construct them into a coherent whole was a herculean task for any mind, but to do as Lord Coke reports to have been his method was still more impossible to a less than marvellous intellect. His plan was to listen to the opinion and thereupon to reproduce in his own phraseology the entire discussion. That he succeeded is shown by

¹⁷ Minor's Conflict of Laws, § 16.

the fact that the first eleven volumes of his reports stand so high in the esteem of the profession that they have been characterized as *The Reports*. However, it must be borne in mind that Coke was reputed to be the greatest authority upon the common law in England. His reports were monuments of learning. With the exception of the *Year Books*, the reporting of English decisions has been done by private enterprise, sometimes in later years authorized by the judges. While by this system some of the reports reached a high plane of excellence, others did not, so that it becomes necessary for the lawyer to know the reputation and skill of the individual reporter. Wallace, in his valuable work, "*The Reporter*," says that some were compiled from notes taken by able lawyers, but others were made up from copies of the original and in some instances from second and third copies. As a result many of the reports of the second period of reporting from the *Year Books* to the *Term Reports* (1785) are next to worthless.

In America reporting has been done both by government provision and by private initiative. Usually the states have a court reporter selected for the work and paid from the public treasury. The sets of books issued by the government are denominated "official." Moreover the practice in our country has been to require the court through one or more of its judges to file a written report of the court's opinion, and hence the exact language of the judges themselves is preserved for general publication and becomes an authentic record of what actually occurred. It thus becomes a part of the court record. By this method the medium through which the court renders and perpetuates its disquisitions is made all but perfect so far as its function is concerned. The wholesome effect of written publicity upon the accuracy, soundness and learning of the opinions thus rendered can not be overestimated, but much other material must be added by the reporter before the case is complete.

The Parts of a Report.

The material furnished by the court in his hands, the reporter then proceeds to write out the case and frame it up according to the established usage which is to divide the subject-matter under the following heads, to wit: title, syllabus, statement of fact, argument of counsel, opinion and decision. For the correctness of all except the last two the reporter is responsible, unless as in some jurisdictions the facts are stated by the court.

THE TITLE.

The "title" is a mere abbreviated statement in the form of the name of the plaintiff, followed by the term, versus, or its abbreviated letters, vs., and succeeded by the name of the defendant. In actions "ex parte" the form employed is the Latin phrase, "In re, John Brown et al.," which means, "In the Matter Relating to John Brown and Others." No error is likely to affect this purely formal matter except that of typographical mistakes.

THE SYLLABUS.

The "syllabus," which is what its name indicates, an epitomized summary of the case, and which is usually printed in small type, or heavier type immediately below the title, demands especial attention. This part is susceptible of grave errors and leads often to serious blunders in practice, for it is too frequently taken to be an "open sesame" to the doctrine of the case, whereas it turns out to be nothing but a guide post with a finger often pointing in the wrong direction. The purpose of the syllabus was not originally, that its statements should become a substitute for the case itself in the use of the practitioner, but merely a reflector of what

the case contained. The danger arises in the very exacting requirements of such a purpose. To reflect the case truly means not only to understand, but to comprehend the full significance of the case, to see it as the judges saw it, and again to reflect it in the sense intended means to reproduce the essence of the case in miniature, that is, to express it in condensed form. Now to have grasped the case was an achievement even by the judges in many cases, but to reduce it to a few words would hardly be a feat expected of anyone less able or conversant with the situation than the bench itself, or at least one of the counsel, but this is exactly what the reporter essays to do. Sometimes a judge writes out the syllabus, but in most jurisdictions it is a strictly extrajudicial work and hence even in his hands it is not necessarily authoritative.¹⁸ The reporter may be performing an official duty, may be as sometimes occurs a person learned in the law, but in any instance to approach a case from the "outside", to have no especial incentive to separate diction from law, and in many cases to possess no such power of condensation or adequate language expression sufficient to successfully reword the doctrine with its proper emphasis, is to be obstructed by such a handicap, that the wonder is that a syllabus is of any practical value at all.

Nevertheless the syllabus serves a useful purpose as an aid in the hands of a judicious lawyer when in a haste he desires to quickly locate the law. But its function is really limited to locating law and not to an exposition. No careful practitioner relies upon this, the reporter's account of what in his cursory examination he has taken the case to be. Nothing but the precise words of the court itself should be the objective point of the attorney's search. To do less will eventually prove disastrous, for not only are many of the

¹⁸ *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. 107.

syllabi defective and misleading, but some of them are actually wrong.¹⁹

Even correct syllabi are not always clear. They present much the same question of mingled material as does the material they sum up. Indeed, when the material first hand from the court must needs be sifted to ascertain values, it could hardly be expected that the syllabus would improve upon the matter. And it usually does not, although there are many very excellent syllabi. It is much more likely to mix up than to sift out material. The reporter having his attention fixed upon value rather than upon kind of value, and recognizing the worth of dicta, tends to burden the syllabus with it until "dicta" and "ratio decidendi" are indistinguishable. So too it would be little less than a miracle if the relatively proper emphasis belonging to the principle of the case should be preserved in the syllabus. In the syllabus the case is in danger of losing all perspective. The lawyer should never, therefore, confine his estimate to this part of the case, however brilliant or extensive it appears to be.

STATEMENT OF FACT.

The statement of the case is presumed to cover the field of fact involved in the case. To do this with sufficient order and completeness to furnish an adequate ground for use in future cases, as well as to make such a record that the issues determined may be identified as matter "*res judicata*" for all time, once more taxes the skill of the reporter. Not only must the facts of the case be limned out truly and in a manner displaying their peculiar complexities and ensemble, so that the parallel or lack of the same between it and future cases may be accurately measured, but not infrequently, this is made most difficult because the litigation has been a long

¹⁹ *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 272, 6 L. ed. 606; *Behn v. Burness*, 3 Best & S. 751, 760.

drawn out battle and the decision is the climax to a struggle in the courts lasting through months or years and passing through a series of hearings and courts. All such historical matter, where the case is of importance, should be narrated from the very occasion of the action, and in some instances even going back to the very origin of the trouble. Such a statement of fact is found in the celebrated case of *Gibbons v. Ogden*²⁰ over rights growing out of a franchise granted by the state of New York to Robert Fulton for the promotion of steam navigation upon the Hudson River. So also the famous *Dartmouth College Case*²¹ exemplifies a historical setting as does also the case of *Dred Scott*²² and many others, but particularly cases involving the question of title to property go back, not infrequently, through a tortuous path of changes in ownership which require the most exacting care to trace them accurately and clearly. An intricate novel plot presents difficulties of narration and threads of less complexity than do some of these legal labyrinths. It is needless to say that the lawyer should test the consistency of the narrative of facts very thoroughly before drawing deductions from them. The erroneous use of the terms plaintiff and defendant, appellant and appellee, or any other legal terms which identify persons may sometimes throw the whole report out of alignment.

ARGUMENTS OF COUNSEL.

Following the statement of fact comes, in some reports, a summary of the arguments of counsel together with authorities and comments. It is seldom that an argument is given verbatim or in full, although in some of the more

²⁰ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

²¹ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

²² *Dred Scott v. Sandford*, 19 How. (U. S.) 393, 403, 15 L. ed. 691.

important cases liberal extracts are inserted upon occasion.²³ Usually the style is an informal discussion of the contention of counsel with comments upon and citation of the authorities quoted from briefs. There is apparently no attempt to conform to the rigidity of a brief and perhaps such would be impracticable, taking into consideration the too often verbose and poorly constructed character of the same. Furthermore, this material is not law and has only such value as it carries "per se", for the reputation of counsel is seldom sufficient to carry much weight of its own since even by learned counsel the viewpoint would be only from one side and until checked up by the opponents argument could not be said to be a full scientific exposition of the law. It is simply the advocate's case and does not profess to favor both sides impartially. Nevertheless it affords an excellent opportunity for the practitioner to use it in measuring the strength of the court's opinion. For if it can be seen that the court reached its conclusion in the face of such an array of argument and authority it presages thoroughness and deliberation in the decision. So too the lawyer can better understand the comments and reasons set out by the court, which are often directed pointedly in answer to contentions of opposing counsel without elaborating upon their details. To secure the true bearings requires a perusal of what the counsel have actually said as well as the words of the court. The extent and exhaustiveness of this part of the report varies from a paragraph to many pages, depending, of course, upon the nature of the case. It can easily be seen what judgment and legal grasp is necessary to extract and focalize points of a learned disputation. The great constitutional cases usually present exhaustive discussions by counsel.

²³ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

THE DECISION.

The decision naturally completes the report, and as already pointed out, may be supplemented by an opinion, and may not. It may not even state explicitly the doctrine of the case, but may conclude with the mere statement that the decision is sustained or reversed, in which case it is necessary to consult the former decision to find what the exact ratio decidendi of the decision was. A full consideration of this part of the report has already been made and needs no further comment.

A summary of the defective conditions affecting the value of a report may thus be enumerated as follows:

1. That the reporter may not have acquired a good reputation. The early cases were much more liable to this blight than those reported since the organization of our government. Lack of method, system and proper authority and responsibility was no doubt largely the cause of such imperfect work. The lawyer should acquaint himself with the reputation of the reporter.

2. Among several reports of the same case there may be substantial differences, which only goes to show how much of the individuality of the reporter is stamped upon a case. If the reports refuse to be harmonized, that version should be accepted which comes with the best credentials, but even then the variance will always raise a reasonable doubt.

3. The syllabus may be so confused and inadequate that the inference is irresistible, that it could not have resulted from a sound and sufficient understanding of the case, and hence the presumption is against correctness and merit in the remainder of the report.

4. Again, the statement of the case may be so badly written and the material so badly ordered, so ambiguous and confused, or so meager in details that the exact question propounded to the court is uncertain.

5. The opinion itself, notwithstanding that it comes from the court, may be far from a classic in English. Sometimes it is too curtailed as in early English days, or fragmentary in style, but the American opinions are usually of sufficient length, very often well written, but now and then extremely mediocre and lacking in edge.

6. There may occur inconsistencies between different parts of the case which proves the presence of error somewhere, but since the "where" is not always easy to prove the case assumes a doubtful aspect.

7. The summary of the disposition of the case may not appear, and hence the final clear-cut wording which is valued for its incisive authority is wanting to give the case its fullest usefulness.

CHAPTER VII.

ESTIMATION OF LEGAL LITERATURE.

The Law Library.

Books in a broad sense form the lawyer's working tools. They have multiplied in following out the specialized branches of the law, and they have multiplied to preserve the ever increasing generation of cases until they are, figuratively speaking, piling up mountain high. Now to overcome this excess of diversity has come the period of condensation with another multitude of books from another point of view. And so the movement of expansion is met by a movement of contraction until between the two the average lawyer is bewildered in a confusion of odds and ends. The result is, that the wise practitioner of today must become a connoisseur in book lore, both to know what is the best and to bring the best within his financial reach. Unnecessary duplication is what the lawyer attempts to eliminate in building up a library, for a library must be planned and scientifically constructed. Collecting a library is a misnomer. There are certain essentials to a legal library in order to constitute it an adequate "kit." Beyond this point the degree of completeness with which extra finishing tools may be added to conserve time is growing yearly greater.

Where there is no systematic plan by which books are selected, much money may be expended with very impractical results. These questions arise in the selection of a library: (1) What books are practically necessary; (2) what additional aids to accuracy and convenience are extremely advantageous; (3) how much capital is available for the purpose; and (4) what books of a side line are likely to prove most serviceable.

It is a poor policy to become economical in curtailing so-

called practical necessities. They should be secured at any cost, but the test of what is a practical necessity may give some trouble. It may be claimed with considerable force that only experience will reveal this fact. A book is valuable only for what can be done with it—no more and no less. Law books are not a practical necessity, therefore, because they look imposing or represent the very latest in publishing. They will be valuable as a foundation for a particular library in proportion as they will help do the things which the particular lawyer will have to do immediately in the particular locality. Having intimate knowledge of his own personal conditions, and having been sufficiently trained in law to know what knowledge is uniformly required in all actions, and finally, having learned from the nature of the field in which he proposes to practice what forms of litigation or legal business are most common, he can judge with approximate accuracy of certain books which will be needed. Thus there are crop contract districts, irrigation districts, mining sections, timber countries, and manufacturing localities, each of which call for a branch of specialized law.

Assuming that he knows his practical needs in the order in which they are likely to arise, the next thing is to know the books themselves. And there are a good many things to be learned about particular books before any really safe estimate can be made of their serviceability. There are numerous rules formulated for the interpretation of law, but many lawyers innocently suppose that they can pick up by casual examination whatever is necessary in the way of a law book. But a law book bears such an intimate relation to other law books that to appreciate one implies a still further appreciation of others. Law, in fact, is a system, and not infrequently the most valuable thing about a given book is the relation which it establishes between its own subject-matter and that of other books. And again, there is the important process of making the book, or set of books, which

enters into the problem of estimating value. Some books are a cheaply commercialized product and are manufactured and vended as a large manufacturing plant would produce articles of commerce with no more measure of exhaustiveness in treatment than is necessary to relieve the output from positive injury. What is sometimes sought is talking points, and these may be no more than a cheap veneer to cover up a very unauthoritative work. Of course, this is not necessarily a fraud for the article is sold upon inspection, nor is it illegal, it may even possibly secure the best results obtainable under the circumstances, but the method is one which often places accuracy and scholarship as a means to a mere immediate pecuniary reward as an end.

Short courses in the study of law have been especially subject to this defect. However, the well-established and reputable law publishing companies have been of much service to the profession in maintaining a high order of legal literature. It may be justly said to their credit that they usually seek earnestly to anticipate the needs of an authoritative jurisprudence. Thus they strive to simplify the process of finding the law and to economize the time of the practitioner. For the question of finding the law in the midst of such an ever increasing volume of legal reports and literature is becoming a dominant factor in the practice and this is making it more imperative from year to year to estimate a law book from this especial point of view.

Classification of Law Books.

Law books in general may be classified into: (1) Those which purpose merely to publish particular laws and decisions. (2) Those which endeavor to collect and compile the law from whatever source upon some particular subject. (3) Those which aspire to expound and explain the particular law. (4) Those which philosophize upon legal theory and origins

(5) Those which attempt to supply method and aid in the practice of the profession. Of these the first expressing the law in the very words in which originally expressed constitute the primary actual laws having imperative authority. The remaining classes, presuming to restate the particular in a more general and useful form and thereby introducing the personal element of the writer, constitutes secondary law, having merely persuasive authority according to the reputation of the author and the work itself. This distinction is so fundamental as to merit further discussion.

Distinction Between Law and The Law.

Law, it has already been pointed out, is only supreme and imperative authority within its own jurisdiction, but, nevertheless, it may become and does become persuasive authority over other jurisdictions. It thus wields a twofold influence, and from this double service arises the difference between Law and The Law. The latter term expresses what is meant when referring to the contents of a particular constitution, code or statute. It is the duty of every court first to apply the law of that state, but when the point is not so covered it falls back upon Law as found elsewhere. And so voluminous are the principles of law that no state can formulate more than a general draft of the great scheme, supplemented by a few hundred session laws, and must depend for the remainder upon other sources. Obviously, these other sources become the material for many books to collate and systematize, and what they give us is, not The Law, but generalized Law. Usually the process of accumulating Law is a most difficult and arduous process, for it must be sifted out of innumerable statutes and decisions until its prevailing presence is disclosed, not altogether determined by the number of jurisdictions in which found, nor the number of cases in which followed, but also by the ability of the courts sustain-

ing the principle. Of course such a process of analysis, research, discovery and comparison calls for a large ability of a personal nature in the author, as well as expert knowledge and training, but when we add to these requirements the further literary skill and logical acumen in many instances to restate these findings into an orderly and systematic whole, we have some idea of the difficulty and importance of the task. However, in view of the fact that such law is recast from what it was in the original molds it has but a persuasive authority.

Books which publish The Law are as follows: Constitutions, Treaties, Statutes, Session Laws, Compilations and Revisions, Codes, Federal Statutes, Ordinances, Governmental Orders, Rules of the Court and Reports of Judicial Decisions.

Books which discuss Law are: Text Books, Encyclopedias, Digests, Dictionaries, Treatises and Periodicals.

How to Estimate a Law Book.

1. Does it have a purpose which represents an actual need? As to what the purpose is should be plainly indicated by the title, but if not, the preface should briefly designate what it purports to do. It is a mistake for a lawyer not to be familiar enough with his books to be acquainted with their precise boundaries.

2. Does the table of contents indicate truly whether the expansion of treatment is gauged accurately to the need to be supplied? If the want is for quick delivery, a too elaborate treatment is not best, but terseness and brevity are desirable, while if the demand is for detail, then an exhaustive treatment is essential.

3. Does the table of contents reveal an excellent system of subject treatment? Do the divisions follow natural lines or are they forced upon the subject arbitrarily? Is the point

of approach to the topics clear so that the materials will not be overlapping? A serious obstacle in some law books is the recurrent treatment of the same matter from different angles leading to confusion in the reader's mind. No danger in English is more treacherous than the innumerable shifting of position even with due notification and some text-books upon legal subjects are badly afflicted.

4. Is the book apace of the times? For some books are of such a character that their subject-matter is a moving problem and an exposition true at one period may be outgrown or passed by in a decade. Other books have remained authority for many years. For example, the principles of Common-Law Pleading remain relatively fixed while the law of Bailments and Carriers is constantly taking on new accessions.

5. Is the book supplied with a complete index? Much efficiency is added to a book through this serviceable device. It is almost an axiom that a law book is as good as its index, and no better.

6. Are the references adequate? This is a vital point in modern book making. A practitioner not only wishes to know the point, but he wants particularly to know from what original source it came. He is seeking for evidence, and evidence he must have in order to make the point effective. New sets of books are making a special effort to surround each point with all of the supplementary comments and information obtainable. Even books publishing primary law are appending disquisitions of interpretation and commentaries upon the same. Cross-references from one set of books to another are becoming highly valued.

7. Is the book well edited and printed? An otherwise useful book may be severely impaired by poor spacing, improper indentation, lack of proper paragraphing, absence of headlines, and no perspective in type corresponding with thought divisions to assist the eye in locating matter quickly.

8. Of what reputation is the author? It is not conclusive that an unknown author may not produce a splendid work, for this has often happened, but it is some evidence in the book's favor if it have a distinguished author along the lines treated. Some names, such as Blackstone, Coke, Mansfield, Story, Marshall, Pomeroy, Wigmore, Cooley, Elliott, Jones, Bishop and Thompson have become synonymous with authoritative jurisprudence.

The Constitutions.

The Federal Constitution.—First of all the American lawyer must have a copy of the United States Constitution, not because of the extent, but because of the intent of its use. And what is true of the Federal Constitution may be applied equally well to a copy of his own state constitution. But neither of these documents are extensive enough to justify publication alone, so that they are usually issued in conjunction and combination with other material. Hence, the best copy of a constitution will depend upon the associated contents. A pamphlet form is likely to prove undesirable because it is harder to preserve, and more difficult to utilize in an office on account of both size and binding. While not advantageous as an office copy, nevertheless it serves a useful purpose as a detachable and movable convenience. Copies of this form are published and distributed by the Federal Government, but if the combined form is desired, there are numerous choices, to wit: In all text books and treatises upon constitutional law, as well as in most of the selected cases on American constitutional law, will be found authentic copies of the constitution. Or again, together with copies of the Declaration of Independence, the Articles of Confederation and the Ordinance of 1787, the United States Compiled Statutes Annotated, 1916, includes a copy of the Federal Constitution with annotations by section

and paragraph by reference to all cases construing the same up to the year of publication. In addition to these, the various states in the publication of their compilation of state constitutions and laws from time to time generally include a text of the United States Constitution frequently well annotated.

SUPPLEMENTARY SECONDARY AUTHORITY.

In order to thoroughly understand the Constitution, the lawyer will find it advantageous to become familiar with its origin and development. This leads at once into a review of constitutional history, and since this runs back into English times it is well to begin there. There being now an extensive literature upon the subject, several representative works thereon may be had. Logically a history of England makes a splendid adjunct to take in addition. Coming to American times, we have the celebrated work of Dr. Von Holst in eight volumes, but to get the very discussions of the constitutional convention itself, Elliott's Debates are indispensable. Finally, a good, brief, general history of the United States, is sometimes a convenience.

As a background for constitutional theory, there is always needed a discussion of political theory and development. Some reliable work should be had which gives a brief exposition of the nature of forms of government, and especially on the question of the art of government, going into a detailed comparison of the practical workings of present existing governments. So also excellent accounts of the development of political parties are now available in single volume form.

Along the line of constitutional exposition and interpretation there are a number of established works. Cooley, Black, and Pomeroy have one-volume works on constitutional law, Tucker, and Story, two-volume discussions. Then, too, An-

draws' American Law and Bishop on Statutory Crimes touch certain phases of this species of law. On the more general treatment of the making of constitutions there is nothing better than Jameson on Constitutional Conventions, while upon the effect of constitutions after adoption Judge Cooley's Work on Constitutional Limitations has never been surpassed.

State Constitutions.—Copies of the state constitution will of course be found in every lawyer's library. These are invariably published with codes or compilations of session laws and are usually fully annotated. Generally, they also contain the acts of congress authorizing state government. As a general repository of all the state constitutions, the work on Federal and State Constitutions by Ben Perley Poore is invaluable. In this one work are brought together all of the state constitutions, preceded in each case by whatever primary organic act existed, be it a charter, a treaty, an act of congress, and whatever amendments have followed. There being much more occasion to consult the state constitutions than the Federal Constitution, several copies should be provided, some in detached form and to at least one of these should be appended notes from time to time as new disquisitions upon its features are made by the courts. There may be some particular provision or provisions of a constitution which, while not having been construed by the courts, are giving much trouble to the practitioner. In such case the prudent lawyer will inform himself upon both or all sides of the contention, so that no one within the jurisdiction is better qualified to express an opinion. It is a wise habit to write out a statement of such a proposition and what may be said in favor of different views and file the same away for future use.

Treaties.—Treaty making, being an international process, not often enters directly into the practice of a lawyer, but sometimes in connection with the rights of aliens in this

country, or rights vested in property along boundary lines with foreign countries, or springing out of maritime enterprise, or in still other ways, the need of consulting a treaty may be imperative. The trouble over the Japanese land laws in California furnishes a splendid instance of how important treaty rights may become in relation to state legislation and private interests.

Now the value of a book upon treaties will turn largely upon what supplementary aids are supplied with it. A bare print of the text itself may be totally inadequate to clarify the point desired, and then the field of international law will need to be combed. Of course, one difficulty in the way of complete reports is the fact that international negotiations leading up to treaties, or in connection therewith, are usually, for public reasons, kept private. Many such state papers can only be examined upon request and official permission.

Copies of treaties may be obtained as follows: The United States Statutes at Large print each year under the congress in which consummated all treaties made during that session, while all of the treaties from the year 1776—1871, were published in the 41st Congress, 3d Session, Senate Executive Documents, Doc. 36, Serial No. 1,441, or a complete set of all the treaties will be found in one work under the title, *Treaties and Conventions Concluded Between the United States of America and Other Powers Since July 4, 1776*, in which the United States Government in 1889 published together all the treaties between ours and foreign nations. Again, if a complete set of all the present existing treaties be desired, it may be found in the latest compilation ordered under the Resolution of the Senate of the United States, February 11, 1904, and in the later Statutes at Large. There are collected in this not only the treaties, but the conventions, important international acts protocols (except claim

protocols), and agreements entered into and in binding force on and after April 28, 1904.

Finally, of particular interest to the profession in our western states where large Indian reservations exist, is the publication by the government of a compilation to December 1, 1913, under the caption, Indian Affairs, Laws and Treaties, a work of three volumes, giving an accurate text of all treaties, orders and other material, in fact, everything of real value concerning Indian legislation from the beginning of our government to the time of publication.

Supplementary Authority.

Once more we must fall back upon books of an extra legal nature for assistance in measuring the significance of international agreements, for they involve much of ethics, of customs, of international courtesy, of that indefinable art called diplomacy or national tact, and of that horopter of outlook policy, well illustrated by the Monroe Doctrine. Looking to the power itself of making treaties, the two volume work of Charles Henry Butler, on The Treaty Making Power of the United States, Crandall on Treaties, Their Making and Enforcement, Tucker on Limitations on the Treaty Making Power under the Constitution of the United States, will be of genuine service.

The subject of international law itself has been covered by a number of excellent works. The field, however, is developing at such a rapid rate in recent years that what has amounted to merely an international code of promises backed up and based only upon moral restraint, is fast approaching a distinct legal status; but, since the present European war the substantiality of this advance is very much in doubt. In these days of formation, therefore, the lawyer can not afford to be without an intelligent grasp upon the movement.

Legal Codifications.—These are comprised of Codes, Re-

visions and Compilations in the order in which scientific treatment has entered into the production. They may be classified under the general head of statutes in contradistinction to constitutions and treaties, but statutes is a word more generally associated and used by the practitioner in referring to session laws, hence it is well to use the term according to this usage.

The code is usually anticipatory in its origin while revisions and compilations are products of afterthought and necessity. While some of the states when entering into statehood not only provided a constitution for themselves, but also a complete system of positive law, others later on have done the same, and these states are usually referred to as the Code States. The code is usually prepared by a commission of experts authorized for the express purpose, and in their work they utilize material from all sources: customs, cases and statutes, from common law, or general law, or prior territorial legislation—in fact, they draw upon whatever they deem valuable, reshaping the material into such a form as to render it harmonious and suitable to become a part of a complete system. This work, once submitted and ratified by the legislature, supersedes all existing session laws and becomes the paramount law of the state. The success obtained by these codes has been of varying degrees. Some are poorly arranged, incomplete, meagerly annotated, badly indexed, and confusing to one unacquainted with their peculiar construction. The first thought of every lawyer, nevertheless, is to master the code, even though in the way of effort, it amounts to piling Ossa upon Pelion. But the name, code, has been used indiscriminately to refer to any form of consolidated and systematic law, hence the title is not certain to distinguish a code proper from somewhat similar bodies of law denominated revisions and compilations or codifications in the narrower sense of the term. To be more explicit, a revision is usually brought about by

the accumulation of statutes supplanting and amending each other until the clear outline of the law begins to be lost in an intricate mass of verbiage. In the course of time the legislatures lose trace of preceding enactments, the members are illy informed of exact details, and sometimes of entire laws, and thus new laws are conceived and passed without due regard to existing statutes. The public, as a result, is incapable of understanding the law, even if such, under normal conditions, were possible, and, as a result, it devolves upon the attorney to labor with the inevitable confusion. To restore order out of such a chaos the legislature may order a revision.

The revision contemplates not only a re-examination of existing laws, with a view to arranging the subject-matter in a more orderly and condensed form, but also, when necessary or advisable, to restate the law in better language and with more logical consistency. This work, having been done by a commission, is then re-enacted as a whole into law by the legislature and thereafter supersedes all statutes in the ground covered. The compilation is not so ambitious in purpose as the revision, but merely collects existing statutes in force and reorganizes them according to some form or plan rendering them more accessible for use with possible annotations to locate them in their respective session laws. It is obvious that considerable skill and legal ability is indispensable to any high degree of excellence in the making of codes and revisions. As a matter of course, each state publishes copies of its own codification, usually including therewith a text of the United States Constitution and that of the state constitution respectively. Such works are a necessity to the practitioner within the jurisdiction, whether they be satisfactory to the profession or not.

Statutes.—Statutes more often refer to the acts of congress and legislatures passed in the ordinary process of legislation. Those emanating from the state law-making bodies

are called session laws, and those from the United States Congress, federal statutes. The laws passed at one session are, at its close, published in a permanent volume entitled Session Laws of the year ——. Each act in this volume is described as a "chapter," so that a particular law may thereafter be referred to as such and such a numbered Chapter of the Session Laws of the year ——. The latest session laws contain the newest and most authoritative law of the state upon the special subject barring the constitution itself. Much importance, therefore, attaches to a thorough digest of them at once. Amendments and repeals of existing laws need especial attention. The session laws are primarily supplementary to the code in code states, but the repeal of a provision of the code follows in the same manner as the repeal of an existing session law. There is no especial method of repeal or amendment as is provided for in the alteration of the constitution. A session law is in force upon its signature by the Governor of the state, unless there is provided in the bill itself a time when it shall become operative, and it remains in force, until repealed, for nonuse does not outlaw a statute. A statute which proves unconstitutional and is so adjudged by the Supreme Court is rendered void from its date of going into effect, but matters which have been litigated and settled under a decision of the court involving such a law are, nevertheless, held to be permanently *res judicata*.

The federal statutes are the work of congress, and the government of the United States makes provision for the publication of this product. Each day during a legislative session a bulletin is issued, called the Congressional Record, which gives a full account of all motions entertained, debates, speeches and business transacted in both Houses, as many copies of which as are desirable may be obtained at cost of publication and mailing. Furthermore, at the close of each session, for there may be by extra call of the President

more than one, the Government issues in unbound form all bills in chronological order, treaties, resolutions and proclamations of such session. These editions are entitled: Statutes of the United States, and under the name of Pamphlet Laws are distributed free of cost by members of congress to their constituents. Finally, upon the termination of a congress all the laws, treaties, resolutions and proclamations are compiled from the Pamphlet Laws and published in book form. These are then denominated the United States Statutes at Large and may be purchased from the Superintendent of Public Documents at Washington, D. C.

Compilations.—A situation parallel to that which developed in some of the states also necessarily came to pass in connection with the accumulation of federal statutes. In 1874 Congress ordered that all statutes, general and permanent in character, in force on December 1, 1873, should be collected and published in one volume. This work appeared in 1875 under the heading, Revised Statutes of the United States, followed by a second edition three years later, the Revised Statutes of 1878. These so-called revisions were not restatements of the law, but a more compact and orderly presentation only. From the year 1874 the subsequently appearing volumes of the Statutes at Large were condensed and published in successive supplements, but in the course of time these, as well as the Statutes at Large, became so many that confusion as to the exact status of existing laws arose. Congress was becoming entangled in uncertainty over the maze of enactments and their interrelation. Congress authorized a commission to revise and compile the federal statutes. This commission reported to a subsequent congress but the result of their labors was not adopted by congress. This condition has resulted in several private publications of the federal statutes. One of these is the United States Compiled Statutes Annotated, 1916, in twelve volumes, which

contains all the general laws arranged under topical subject-matter headings.

Another compilation of the federal statutes is available, being a work of twelve volumes under the caption, "Federal Statutes Annotated," Second Edition, 1916. The plan in this work is an alphabetical arrangement of statutes according to subject-matter, while an index to section numbers locates each discussion in its proper volume and page. The annotations in this work are very complete and make the compilation very serviceable and attractive.

A complete compilation of all federal statutes of general nature to July, 1917, entitled United States Statutes, 1917, contained in one large volume will be issued this year.

Although the order of frequency in use by the general practitioner is state law, general law and federal law, yet a set of these books should be added to a legal library as soon as finances will permit. It is not always that which touches the practice oftenest nor most directly which is the most important factor in legal success. A breadth of understanding is to a lawyer an incalculable asset.

Quasi-Statutes.—Municipal ordinances are laws of primary authority and the publication of them is usually prescribed in the city charter. If not so provided by legislative authority, a copy can only be secured by having a transcript taken from the original document. A lawyer's office should not be without a complete set of all municipal ordinances as well as a copy of the city charter and by-laws, and a lawyer with a local practice should be thoroughly conversant upon every phase of his own city law and government.

Executive and administrative orders by the government as well as military regulations, while not called statutes, nor originating as statutes usually do, are, nevertheless, in force and effect, laws. Copies of general orders and proclamations are issued to the public press for publication, but military regulations may for public reasons be kept private.

Rules of the Court.—These regulations made and imposed by the courts themselves to facilitate their work are of imperative authority, and belong to two general classes, to wit, state and federal. No emphasis is needed to point out the advantage for a lawyer to know the rules of the courts under which he practices, but nothing of such importance seems to be harder to acquire, especially with reference to the federal practice. The rules among the states vary and are subject to change, while the rules in use by the United States District and the Circuit Courts of Appeal not only differ according to the kind of court, but also among the subdivisions of each class. So difficult is it, therefore, to master all of these uniformities and divergencies that few, if any, federal practitioners even are an authority upon the subject, it being found "more reliable, if less dignified, to consult the clerk."

A complete set of rules of the federal courts has been unobtainable, so that a general idea of their nature is best gleaned from treatises upon federal practice and procedure which usually set them out to a greater or less extent. Intimately associated with the use of these rules is a knowledge of the jurisdiction of the courts, the method of the removal of causes from state to federal courts, and other similar matters which are important for every practitioner to know. Thus a comprehensive view of the whole question may be secured in Foster's *Federal Practice*, three volumes, a very able and complete treatise upon the subject. Should a briefer treatment be desired, it can be found in Montgomery's "*Manual of Federal Procedure*."

With respect to state practice, the lawyer within the jurisdiction becomes through experience acquainted with the procedure to a greater extent than with that of federal practice, but such information should not be relied upon to the exclusion of possessing and consulting a copy of the Rules of the Supreme Court of his own state. Such a copy, when the same has not been included within some issue of the

state decisions, can usually be secured by making an application to the Supreme Court. Not infrequently there exists a local book treating of the state procedure, and such a work is always of general interest and sometimes of great value to the local practitioner.

Books Treating of "Law."

A broad distinction was emphasized between "The Law" and "Law." The estimation of books containing the former have been discussed at some length, and now let us turn our attention to the various forms of books which deal with law in the more general sense. Concepts of law and principles of law develop through a process of judicial sifting and generalization. Coming in an isolated and fragmentary way, they call for a compilation and organization according to subject-matter to render them available to the student and the profession. Because of this process of coming to fullness in the course of legal adjudication, it is evident that a given concept will present at any one time two aspects, the one being the question of its exact legal content at the present, and the other being the question of what it is tending toward and should reach in the future. The first is a problem of definition and exposition to be solved by dictionaries and text books, the second a problem for philosophical jurisprudence to be solved by theoretical treatises. Besides these phases of discussion, a third very important medium through which "The Law" and "Law" interact upon each other and affect and modify each other, is a system of devices for locating and identifying "Law" with "The Law." These are supplied in the form of digests, tables, etc., etc. Thus, books which treat of "Law" in the sense given may be roughly divided into three classes of publications. The phrase "roughly divided into classes" is used advisedly, for, as might be expected, when we come to place the books them-

selves, we find that authors have felt little necessity of confining their works to merely one or the other of these phases of treatment, but have made all sorts of books of varying combination and degrees thereof. Still the division serves a general purpose.

Books of Definition and Exposition.

Books dedicated to this purpose must, to be valuable, measure up to a very high standard. Definition is a process of setting out and tracing boundaries to a legal idea, and this calls for the most critical exactitude of distinction and expression. The language should be terse, pointed and precise in meaning. Correctness is an absolute requirement to a good definition and clearness must never, in case of conflict, be sacrificed to anything but correctness. Still a lawyer may desire something more than the bare, naked definition of a term. He may wish some meager commentary attached to such definition. Both kinds of books may be easily obtained.

However, there is an intermediary ground between a dictionary which aims in its presentation to emphasize and direct the attention primarily to the limits and bounds of a concept, and an encyclopedia which aims to emphasize the nature of the content of general law—sharply distinguished the one binds in while the other sets out the material content. Between these extremes there exists a third well-defined realm. The purpose of a work to cover this middle ground is not to restate in better form the meaning of legal terms and phrases, nor to determine by discussion and agreement the more authoritative meaning from a number of possible examples, but rather to digest the terms and phrases simply as forms of expression occurring again and again in legal practice. This is not done by referring to cases in which found, so much as by exact quotation of their use from such cases. The practitioner is then left to judge for himself concerning

the relative merits of the uses, or to reason from these data to what essential common elements should be found in a given concept. The importance of such a work is easily seen, when we reflect, that a case not infrequently turns upon the meaning of some term or phrase, and that there are together about 132,000 separate definitions and constructions from reported decisions.

Coming now to exposition proper, or the setting forth of the general content of law, we have encyclopedias, treatises and text books.

The Encyclopedia.—This form of exposition is in plan an ambitious effort to bring together in compacted form a re-statement of all of "The Law" as found in cases and to thus generalize it into "Law," for the direct use of the practitioner. It is true that there are encyclopedias of merely portions of the law, as, for example, those which treat of "Attributive Law" and others which limit themselves to "Substantive Law." In either case, the general method followed out is to divide the subject to be covered into topics which, while inclusive of all of the material, are at the same time as mutually exclusive of each other as is possible. Different encyclopedias will vary at this point in the divisions made, and one of the features of value in estimating them is the excellence of these topic divisions. They should not overlap too extensively, for this originates confusion, in-harmonious statements and duplication of investigation, although cross-references be employed to offset this difficulty.

The "Law" of the particular topic is then systematically organized under main headings and subheads, and each principle is, thereupon, in its proper order, place and lettering, carefully reworded into the most accurate and succinct statement of the "Law" possible. Whenever the exact wording of "The Law" as found set out by the court in some case seems sufficiently clear and well put, it is adopted "*haec verba*" and made a part of the text, as this part is called.

Exceptions to the general rule are often worded just as carefully and immediately following the main principle. Where courts disagree materially upon a proposition, the fact is noted, together with the adverse holdings. The text of a first-class encyclopedia emphasizes the need of positive statements of law and the avoidance of too many qualifying attributes and conditions. Of course, where "The Law" is doubtful, the best encyclopedia will sometimes use the terms "seem" and "appear," or word the matter judicially into the expression of an opinion merely. It is the business of an encyclopedia, however, to so thoroughly investigate every proposition that it may be in a position to make positive statements of what it finds. The enormous labor, learning and skill, nevertheless, required to run down "The Law," buried out of sight in precedents, makes such certainty only a relative matter in most cases, and in many instances more confidence is bestowed upon their authenticity than they really deserve.

It must not be forgotten that an encyclopedia is the work of many different people, some of whom are eminent, scholarly and painstaking, while others are of indifferent reputation and training. This being true, it is well for the lawyer to study into the question of what parts of the work are authoritative and what not. The ordinary practitioner is too prone to accept unhesitatingly whatever he finds in an encyclopedia. If he should compare two different works upon the same topic his confidence in their finality would probably be somewhat disturbed.

The aim of an encyclopedia being merely to set forth in better wording law as it finds it, and not law as it should be, does not require much argument, explanation or illustration in the textual matter, but it supplements the text with copious references to the authorities from which the text is taken or drawn in justification of the draft as it stands. Many times in connection with this, side lights, ex-

ceptions, comments and arguments from the courts, together with notes from the editors, are appended, so that a full understanding of the question may be acquired. In fact, a final imperative requisite of a good encyclopedia is a reliable and adequate body of references and notes.

The Legal Text Book.—In continuing the consideration of types of books, we logically come next to the text book, which is a species of legal treatment midway between the encyclopedia and the treatise, that is, it is similar to the former in method and similar to the latter in scope. A text book is merely an encyclopedia upon one branch of the law. Usually the text book is fuller and more elaborate in its statements of general principles, and not so complete as the encyclopedia in pointing out exceptions, limitations, bizarre cases, and material contingent to the main line. The encyclopedia statements are drawn more closely in actual wording from the language of the decisions from which taken, while the references cited stand in proof and justification of the text, but in text books the law is written not so much to conform to the language of the cases as to express with perfect freedom the idea or principle involved. The references in the text book are more illustrative in use than justiciary, and are not, therefore, so profusely cited nor digested. Of course this contrast in style does not exist in all text books, for some of them borrow much of their language from actual cases, and as already mentioned, all degrees of hybrids are possible in book construction. We are characterizing merely distinctions in type. The text book is like the encyclopedia and different from the treatise, in that it purposes to set forth the law, as it is, without going into any extended arguments as to why it is one thing rather than another. To attempt to do this almost always invites an introduction of the standard or ideal of law as an evidentiary factor, and this at once opens up the discussion of law as it should be, thus entering into the domain of the treatise. While text

books are, strictly speaking, intended for the student of law, they are not by any means meant only for a beginner in the subject. Law is such a jealous mistress that lawyers must continue to be students as long as they hope to keep abreast of the profession, and it is for just such a class of trained students that some texts are designed. To be sure, there are many text books aimed primarily for use in the schools and being more adapted each year to the pedagogical end to be realized. In fact, a text pedagogically sound can not well be adapted to the needs both of a beginner in the science, and to the needs of a veteran of many legal battles. Too many of the text books of law in the past have been woefully deficient in seizing neither exclusively upon one or the other points of view. Because they were written for everybody they come perilously near fitting nobody's needs.

Naturally the school text should avoid all needless technicality and confusion of detail, for the purpose is to leave a clear and definite impression of general principles, and the army of bushwhacking exceptions, unless of considerable importance, are cut off. On the other hand, the old lawyer who wishes a fresh and exhaustive statement of law is more desirous to investigate these very subtleties and nice discriminations than to confine his attention merely to general principles.

To estimate the value of a particular text book will, therefore, require a careful examination of just what the purpose of the author is, and how faithfully he has hewn to the line. Sometimes this may be inferred safely from the preface or table of contents, but the impression thus gained generally needs corroboration by reading some of its material. What one wishes to do with it, and what one can do with it, as elsewhere stated, must always be the final test of the value of a book to the practitioner.

The quality of text books, under the stimulus of competi-

tion, is on the up grade, and the profession is beginning to learn that a distinguished author whose reputation is at stake in the product, is much more likely to produce a work of merit in a text book than is an obscure writer of an encyclopedic article. Nevertheless, they vary as much in value as does the ability of the authors, and hence the personal element must be carefully weighed. The careful lawyer takes neither a text book nor an encyclopedic statement for that matter as conclusive upon a proposition. At best they are secondary authority. Their strength lies in the rational presumption that a learned specialist's opinion, after exhaustive research, is much more likely to be right than the opinion of the ordinary user even after diligent inquiry. The inference made is sound enough, but alas, the assumption that the author is always a specialist or has himself made exhaustive research is, unfortunately, not always sound. They are at least guides to the law if not always guards of the law.

Obviously it would be impracticable, and at the same time unnecessary, to cite a list of representative text books from the numerous publications in the field, for they are well known to every practitioner, yet the practical use of a good text book should not be underestimated in the presence of the more imposing encyclopedia and digest, for a standard case can more frequently be quickly located through the medium of a text book than in any other way. They are splendid repositories of landmark decisions.

The Legal Treatise.—The treatise is the most fascinating field of discussion, both to the ambitious reader and to the author. Because in no other book does the ability of the author display itself so conspicuously, nor does any other field so appeal to the reader's desire for reform and his appreciation of fine reasoning. The result has been that numerous works of a high order covering a wide range of subjects exist. They vary also in the phase of treatment most emphasized, some being highly expository and organic,

especially in the early days when law lacked in organization, as instanced by the Institutes of Justinian and Blackstone's Commentaries. Others have delved into the origins of jurisprudence, as, for example, Maine's *Ancient Law*, Pollock and Maitland's celebrated work, and Justice Holmes' "*Common Law*." Again, others have gone into learned disquisitions of the interpretation of general law, as distinguished from statutory interpretations, and have produced such authoritative works—as those of Littleton, Coke, Kent and Hale, while such American treatises as Wigmore on Evidence, Pomeroy on Equity, Thompson on Negligence, and Dillon on Municipal Corporations as well as Cooley on Constitutional Limitations have attained a plane of great eminence. While much impressed by the reputation of these works, nevertheless the courts usually ask for corroborative decisions, if not for more assurance, at least as a fundamental policy of precaution.

Finally, there are appearing a series of very notable treatises upon the philosophy of jurisprudence by a selection of the world's most noted scholars and thinkers in the field of law. This set of books consists of thirteen volumes, eight of which are issued, and promises to be the most learned series ever produced upon the general subject of law. Some idea of this work may be obtained from the following titles: I. *The Science of Law*, by Karl Gareis of the University of Munich; II. *The World's Legal Philosophies*, by Fritz Berolzheimer of the University of Berlin; III. *Comparative Legal Philosophy*, by Luigi Miraglia of the University of Naples; IV. *General Theory of Law*, by N. M. Korkunov of the University of St. Petersburg; V. *Law as a Means to an End*, by Rudolf Von Ihering of the University of Berlin; VI. *The Positive Philosophy of Law*, by I. Vanni of the University of Bologna; VII. *The Modern French Legal Philosophy*, by A. Fouillée, J. Charmont, L. Duguit and R. Demogue of the Universities of Paris, Montpellier,

Bordeaux and Lille; VIII. The Theory of Justice, by Rudolf Stammler of the University of Halle; IX. Select Essays in Modern Legal Philosophy, by Various Authors; X. The Formal Basis of Law, by G. Del Vecchio of the University of Bologna; XI. The Scientific Basis of Legal Justice; XII. The Philosophy of Law, by Josef Kohler of the University of Berlin; XIII. Philosophy in the Development of Law, by P. de Tourtoulon of the University of Lausanne.

Rating in value and significance with treatises proper, are leading articles upon special subjects in reputable law periodicals. This form of publication is an outlet of expression to many highly specialized discussions of too limited an extent to warrant separate publication. Among the most celebrated of these are the following periodicals, edited in connection with our great law schools, to wit: The Harvard Law Review, The Michigan Law Review, The Yale Law Journal, The Pennsylvania Law Review, The Columbia Law Review, and The Illinois Law Review from the North Western University Law School. Indices to law periodicals may be had in Soule's Index, Jones' Index, and the Law Library Journal Index.

Selected Cases.—The several series of selected cases endeavor to choose the best cases from the great number reported. Particular attention is given to those cases which decide new or unusual features of the law. These include the American Decisions, 100 volumes, covering from the earliest period to 1869; the American Reports, 60 volumes, from 1869 to 1887; the American State Reports, 140 volumes, from 1887 to 1911; this set is continued by the American Annotated Cases, a current publication. The Lawyers' Reports Annotated, 1st series, 70 volumes, 1888 to 1906. This set is continued by the Lawyers' Reports Annotated, New Series, 65 volumes have been issued to date. These sets are especially valuable not only on account of the

quality of the cases selected, but also for the excellent monographic notes.

The Reporter System.—The reporter system comprises the Federal Reporter, the Supreme Court Reporter, the Atlantic Reporter, the Northeastern Reporter, the Northwestern Reporter, the Pacific Reporter, the Southern Reporter, the Southeastern Reporter, the Southwestern Reporter, and the New York Supplement. Weekly advance sheets are issued, and when sufficient matter has accumulated, bound volumes are published. This plan of privately and unofficially publishing the cases was begun in 1879.

As a final precaution, intended for beginners especially, a quotation from Reed's *American Law Studies*¹ is in point. "The student should use text book authors as his legal preceptors for only a season, after which they must be to him what they are to the profession generally. And even while sitting at their feet, he must be taught to test their statements and prove their references more and more every day. Gradually and surely he must form the lawyer's habit of going directly to the sources themselves for the law before he commits himself to taking a position in advice or argument. . . . And our student can not learn too early that he should not rely overmuch on any book or set of books. Even the Federal Constitution, though not a century old, has several times received important amendments. New constitutions, new statutes, new laws, new doctrines are introduced by judicial decisions, are always coming forth, and they beget new law books which supersede the old ones. Books of the law, as a general rule, are sooner out of date than even those of science."

Estimating Legal Devices.

An essential in the practice of law is to make a correct connection between "Law" and "The Law." The practi-

¹ §§ 736, 737.

tioner in every suit begins with a theory of the case, which means simply that he applies his knowledge of "Law" tentatively to the set of facts given him. But he does not stop here. He may not be certain that his remembrance of the principle is correct, so he locates the point in a text book or encyclopedia to get its general bearings in the former, or a more technical wording and understanding of its peculiarities in the latter. Still he has not attached his principle to the imperative authority—to "The Law," which is the moving force in the case. It is "The Law" which has made the act or acts an offense in the jurisdiction, and it is "The Law" which commands the offender to be punished. But what is "The Law" in this case? That is ever the lawyer's practical query and the absolute prerequisite to knowing what it is, is the corollary—to know how to find it. For there may be "The Law" which amply covers the case, but if he can not find it, there is no method of making "The Law" apply itself. Even the courts refuse the responsibility of always applying "The Law" when counsel have failed to discover and apprehend it.

In response to this urgent need to find "The Law," for it has grown to be an art to locate an obscure principle in the immense field of case law today, there have come into existence certain legal devices in the way of books, tables, charts, etc., which constitute a sort of medium or clearance table to facilitate interchange and interaction between "Law" and "The Law," chief among which is the Digest.

The Digest.—The mechanics of this plan or system, as it is sometimes called, is based upon the idea of a huge index from the side of "Law," referring to and connecting with a mammoth table of contents of the substance of particular cases containing "The Law." Thus there is combined a double synthesis, one of the topical field of "Law," and the other of the decisions rendered within this field. Of course, at least two corresponding sources of inefficiency are ap-

parent in such a plan. First the topical divisions may be so poorly chosen that the subject-matter is either not all covered, or there may result the most confusing overlapping. In such instances, unless the decisions are repeated, there may be all the way from one to a dozen places where good fishing may be had for the point desired. Furthermore, another blight of a peculiarly insidious type may follow from a careless classification of materials under the topics chosen. Presuming that excellent divisions into topics have been made, the entire field being covered and the topics being mutually exclusive, still it does not follow that the material of the law will have been properly pigeonholed under the best topic. This will direct the searcher to cases that, while they may contain the point desired, were not decided upon this point and discuss it as merely incidental thereto, if not merely as dicta. The effect is to lead to false practice, the quoting of precedents not four-square to the proposition. It leads the hurried practitioner to use dictum for "The Law," and is all the more dangerous because so insidious an evil. The cases may be so nearly in point that a close scrutiny is necessary to reveal the discrepancy. The lawyer being positive that he has the right topic, is consequently led to believe that he has found all of "The Law," and therefore investigates no further. And no one lawyer has the ability to sift a digest and ascertain just where such spots exist, and while no doubt human limitations make some of this error in the construction of digest unavoidable, still such explanation does not remove the imperfection.

In turning over to the second source of error, we confront a more pervasive defection than in the choice of topics, and the distribution of material under them. We confront the enormous task required to correctly read cases, grasp their central principle, and then in turn attach them not only to the proper digest topic, but to the division and section of the index. Let the slightest deviation be made and the cita-

tion is a misfit. The fault in many cases lies not only in the fact that the table of contents used for each division is often adopted from the syllabus of the case, but that the syllabi, as previously pointed out, although they may be extensive enough, are often themselves wrong. So here again, in multiplied form, we have the danger of "close cases" being taken for cases "in point," to say nothing of absolute misses. All of this detracts from the value of a digest, and yet the supreme assistance of a digest, even with its defects, can not be overestimated, for the lawyer should not expect too much of them and should always resort to the original case in any event.

The worst feature of the digest system is not that the digest does not always give a reliable synopsis of the decision, but that it involves such a tremendous waste of time on the part of the searcher in overcoming these logical discrepancies. Not finding what he wants in the place where he should find it, he assumes, oftentimes, that it is classified under a different heading, and thus he wanders on in the search in an unsystematic manner for an indefinite time. Unquestionably, in many instances, the fault is his own, because sometimes even lawyers are deplorably ignorant of how to find law, and prefer a haphazard search rather than to master a carefully worked out method and understanding of the books of reference. Some users do not even know that method may be followed, both in finding the proper topic and in locating material under the topic. For such ignorance no excuse exists and no set of books is to blame. Nevertheless the same standard of testing value applies to estimating digests as to other books. That set of books which supplies the lawyer with the case or cases which he desires in the simplest, quickest and most reliable manner is, other things being equal, the most valuable to him.

The topics chosen should be entitled by a heading which not merely may suggest to an expert what it covers, but

which compels the ordinary practitioner to know what it contains. This demand is hard to meet, but it is indispensable to the highest efficiency. A guide post which points out neither direction, nor place, and especially if it suggests an error, is worse than a nuisance. The topics are usually arranged in alphabetical order and are subdivided into sections which are numbered, and the nature of the contents is shown by the section line in blackfaced type. Where the topics are large, they are divided into further divisions sometimes for logical reasons and sometimes merely for convenience. Now and then very extensive and complex divisions are again subdivided into smaller parts. A small table of these topical divisions and subdivisions with their appropriate letterings and numberings are then prefaced to the topic to indicate the page upon which found and the material thereunder.

Finally, in estimating the worth of a particular digest it will be necessary to carefully examine into its own construction. There are various schemes, devices and methods employed in this line of bookmaking of differing degrees of utility. Needless to say unless a lawyer masters the technique of arrangement to some extent he will find any digest unsatisfactory. And as a rule the more familiar he becomes with its practical workings the more highly he estimates it. This follows because a workman must understand his tools to get results, and if he masters no other he will probably overestimate the comparative value of the one he has. Many lawyers need a wider knowledge and use of books.

The Citator.—Another device in the finding of "The Law" and second only to the digest is the Citator. The two are logically very close together. The former locates a case but the latter puts a value upon it. Merely to find a case bearing upon the point does not yet constitute it "The Law" in the sense of being the very best authority

upon that point, for while cases are said to constitute imperative authority, they are, in practice, only so at first, unless later followed by the courts. The larger the following the better the authority, so that the word imperative is but a relative matter after all. For the reason that the history of a case has so much to do in revealing its strength, a book called a Citator was devised to meet the demand for this sort of information. This book by a system of tabular representations shows accurately the number of times any particular case has been cited and where. As can readily be seen, this supplements the digest and the two together enable a user to determine very correctly the law and adequate precedents for it.

Supplementary Books.

A legal library can hardly be said to be complete which does not extend beyond the strict boundaries of legal literature, for there are numerous subjects so closely related to the practice of law that some knowledge of them is well near indispensable. For example, it would seem that books treating of the nature of a human being in his more fundamental aspects would be of vital interest to a lawyer who has case after case originating in some mental idiosyncrasy or physical defect or personal injury. How important it is, therefore, to be informed upon the principles and laws of mental action as expressed in logic and psychology should be more apparent with each advance taken in the subject of criminology. Just now the defense or physical degeneracy, of hypnotic influence, of irresistible impulse, of pressure on the brain, of adenoid irritants and of "brain storms," as well as the old refuge in the Higher Law, call upon the lawyer of today for nothing short of technical knowledge of both

normal and pathological psychology, as well as of human anatomy.

Take for example the question of motive and intent which enter so generally into criminal practice. Here at a glance the lawyer confronts the distinctions that hover about these terms. Is a purpose a motive? And if so, is it always so? Are motives and intents synonymous things? Are motives ideas of objective things, or may they be subjective states of feeling, or may they be either? May a person be unconscious of a motive and still possess one in the legal sense? Does law in the use of these terms follow the best psychological use or have a meaning of its own?

Or take the question of suggestion. Does a suggestion ever become strong enough to render one powerless to resist? If so, is a person responsible in law for such a condition even when not morally? When does a suggestion become a fixed idea? What relation has a fixed idea to insanity? What relation between a suggestion and an impulse? Is an irresistible suggestion the same as an irresistible impulse? May a suggestion be received unconsciously? What difference between ordinary suggestion and hypnotic suggestion? Will a person follow a hypnotic suggestion to any consequences or to any kind of acts?

Or again, consider the problem of insanity, always a popular defense and a difficult one to handle. Is insanity a purely mental condition or does it always have a physical basis? What difference between insanity and hysteria? Can an insane person reason? Does insanity necessarily invade all functions of the mind simultaneously? What is a paranoiac? a hypochondriac? What difference between insanity and imbecility? Is aphasia a species of insanity? Is agoraphobia insanity? What relation has insanity to will power?

Suppose it be a question of the special senses. Can a person locate sound equally well in all directions? Can sound be located with one ear as well as with two? May internal changes be referred to and believed to come from external sources? Have hallucinations any relation to a bad ear? Do nearsighted and farsighted eyes measure distances alike? What is color blindness, and is it a disease? Are the eyes easily deceived, and why? What difference between a delusion and an illusion? Are the tactual sensations distributed equally over the body? Are our inferences of space which are derived from tactual sensations always reliable? Are all persons equally sensitive to pain? What are the hot and cold spots? What effect has alcohol upon sensation? Are the senses of taste and smell easily distinguishable? Is taste evenly distributed over the mouth? Does the acuteness of taste and smell remain constant? Are they the same in every person? What is meant by above and below the threshold of sensibility? What is the effect of fatigue upon the perception? Does familiarity change the force of the impinge upon the senses?

Perhaps it may involve some human movement. What difference between an action and an act? What is essential to an act? What relation has the presence of will to the former distinction? What distinction between volition and will? What is reflex action in a human being? What relation has reflex action to legal responsibility? Are habits identical with reflex action? What relation to parts of the brain and hence to injuries of that organ are volitional and reflex movements?

Sufficient illustrations have been given to indicate along one line only what a vast amount of information is related directly to the legal profession. Law is moving steadily closer to scientific investigations and the practical laboratory suggestions of Professor Munster-

berg upon the defects of our witness system, and upon methods of improvement, scorned at first, are gradually compelling respectful consideration while the criminal studies of Lombroso are shedding new light upon the problem of criminology.

Besides the fields of logic and psychology, the field of anatomy in relation to law is of paramount significance to the lawyer. The number of personal injury cases are multiplying by leaps and bounds in recent years. The sacredness of life and limb and the attendant responsibilities of those having it in care are being emphasized as never before. Even injuries from nervous shock and damages from injured feelings are now of common occurrence. Some of these injuries demand a thorough knowledge of the anatomy of the human body, but the relation of human anatomy to a diagnosis of symptoms is a still more technical field. The symptoms of poisonous drugs, of drowning, strangulation, of violence, and any and all methods of producing death are matters of crucial legal import in celebrated cases every year.

Then, too, there is the paramount field of ethics. So important is this subject held to be that the American Bar Association has formulated and had published and distributed a code of ethics for the profession. But what is ethics and what is its relation to the law both in the making and application of legal principles? Are ethics and equity synonymous terms? What relation has ethics to religion? Has ethics any bearing upon a country's ideals and progress? Must law and does law strive to conform to ethics? All of these are fundamental to human life and wrought into the texture and fabric of society so that the lawyer from every point of view moves in spheres of ethical considerations.

But still we have bounding the legal profession the domain of government and practical politics at present in

a ferment of theories and changes, and sociological institutions of enormous power and activity working out their several destinies under the pressure of economic need and law. The lawyer, therefore, can not well afford to be a nonparticipant in the drama which is being enacted about him. The very nature of his calling peculiarly fits him for service to his country, for whatever is done must be done according to law and in respect of law if it is to attain to lasting permanency.

Thus the lawyer needs a vast amount of all kinds of knowledge and he should have in his library some standard works along these various lines. The bibliography of these fields is very large, and it is wise to consult some well known authority in his special subject with reference to authoritative works which are at the same time reliable and not too technical.

Reports of Judicial Decisions.

So much discussion has already been given to the problem of estimating the value of judicial decisions that further extended comment upon the worth of the Reports of these decisions would seem to be superfluous. If these reports were all official in origin no choice could exist, but since private enterprise makes a selection possible some further observations are suggested. And first in order of influence let us consider the Federal Reports. These consist of reports issuing from each division of our federal judiciary system, which provides for one Supreme Court, the Circuit Court of Appeals, the Circuit Courts, the District Courts, the Court of Claims, Territorial Courts, and the Courts of the District of Columbia. The criteria of the merits of these reports are in their completeness, supplementary notes and annotations.

The Supreme Court Reports.

Since the year 1790, the Supreme Court of the United States has issued reports, and for a period of eighty-four years these reports were cited under the name of the particular court reporter. During this period there were ninety reports distributed among seven authors in the following order:

Reports of Dallas,	1799—1800-4.
Cranch,	1815-9.
Wheaton,	1827-12.
Peters,	1842-16.
Howard,	1860-24.
Black,	1862-2.
Wallace,	1874-23.

From the year 1875 the succeeding United States Supreme Court Reports have been designated by numbers, beginning with 91 United States. These official reports are published in advance parts first and later in bound form.

Besides these there are nonofficial reports of these decisions.

Subordinate Courts of Appeal.

In 1891, final jurisdiction over a large class of cases was taken from the United States Supreme Court to relieve the congestion of business before it and was given to a new tribunal for the purpose, called The United States Circuit Court of Appeals. These cases thus bring a large line of Supreme Court precedents down to date and are of equal value and authority. They have been reported in the Circuit Courts of Appeal Reports, cited "C. C. A.," at the rate of about four or five volumes a

year. This set is annotated fully with reference to questions of practice which are likely to arise upon the establishment of a new court, and with reference to selected subjects of general usefulness and everyday interest to the practitioner.

A now practically obsolete set of reports entitled the United States Appeals Reports, also published in sixty-three volumes, but in 1899 discontinued, may be brought down to date by connecting with volume 34 C. C. A. Reports. An index-digest of C. C. A. Reports, 1-60, in two volumes, gives in a table of cases, cross-references to other publications of the opinions of these courts. So also the decisions of this new Court of Appeals are to be found regularly in the Federal Reporter.

The cases decided by the United States Circuit and District Courts after many years of sporadic and unsystematized publication were finally collected covering a period from the earlier times to 1880 in a splendid work, consisting of thirty-one volumes (including a digest) entitled "The Federal Cases." This very complete work contains a total of approximately 18,000 cases, consisting of 150 volumes of old Circuit and District Reports, 5,000 cases reported in legal periodicals and almost 18,000 cases recovered from old manuscript. The cases are arranged by title, alphabetically, thus rendering them very accessible.

From 1880, when the Federal Reporter was established, the succeeding cases from these courts have been regularly reported to the present time, thus in connection with the Federal Cases making the reports of these courts complete.

There is a special series of reports of the District of Columbia Court of Appeals and the courts of the District of Columbia in twenty-nine volumes to February, 1908 (vol. 18 out of print). These reports are important, consisting of

final authority over the Commissioner of Patents in Interference and Trademark Cases. The Court of Claims Reports began in 1863 and are designated by number. Fifty-one volumes have been issued up to 1917.

State Reports.

These reports may be obtained through either official or nonofficial channels since the states uniformly publish their own reports and much private capital has also become interested in their production. In judging these reports it is not exactly a question between official versus nonofficial reports, for many lawyers desire both, where they can afford it, for special reasons, each office usually having a copy of its own official state reports at least. But as a selection between reports covering different jurisdictions, it may be emphasized that the first outposts of indicia relating to evidentiary value is perhaps: (1) The reputation of the state in this connection; (2) the reputation in a few instances of the particular author of the reports; (3) the makeup of the book itself, and, finally, in a general way the standing of the publishing house from which issued.

Of course reputation being merely a general professional opinion, reaches only a degree of moral certainty in its conclusions and many individual lawyers disagree with it in their private judgment, based largely upon a personal experience which can not in the nature of things be very extensive when measured by the total volume of litigation. As between the American and English reports there can be no real choice, inasmuch as the former are imperative authority, while the latter are merely persuasive in their authority in this country. The American reports therefore merit first consideration.

Reputation of States.

Outside of the field of the Federal Courts, the celebrity arising out of the work of particular tribunals usually identifies itself with the state rather than the courts themselves, so that certain states become famous for their decisions. Thus, for example, the states of New York and Massachusetts are quoted more often than any other commonwealths in actions at law while the New Jersey and Pennsylvania reports are widely known in equity practice. In a similar manner the reports of Illinois and Indiana are highly esteemed throughout the Common Law states, while California is voluminously quoted by the Code states, particularly those fashioned upon the model of the early Charles Dudley Field Code of New York. Throughout the middle and western states the decisions of Iowa, Minnesota, Wisconsin and Michigan enjoy great prestige. Ohio, Virginia, Connecticut and Maine cases are also widely used, while the states of Missouri, Texas, Alabama and Georgia are among the leading states of the South. To a considerable extent the reports of states are valued more highly in their own section of territory than elsewhere, as probably reflecting the sentiment and customs of their own people better than those of remote districts, but this is not always true, particularly when legal origins are a factor in the case as where the state constitutions or codes have been derived from the same source or copied from each other, or where peculiar forms of litigation bind interests otherwise remote together as illustrated by mining regions or water-right territories or land settlement laws.

Reputation of Authors.

This is a phase of the estimation process which is more significant in connection with English than Amer-

ican Reports. The process of reporting at the time our reports began had already acquired more system, and with the additional aid of the courts writing out their own opinions was rendered much more satisfactory than in the early times. Moreover the custom of designating reports by the name of the Court Reporter has gradually fallen into disuse and the system of numbering the reports from one upward, as, for example, 112 Mass., 69 Ill., etc., has been substituted so that the landmark of personality in reporting is rapidly vanishing. Furthermore it is not easy to show whether the Reporter's name has become famous because of the excellency of his work or because of the merit of the opinions delivered and written out by the court. In most cases probably a combination of both exist, and then, too, it must not be forgotten that some of the best known names are among the earliest of our reports, and hence longest in use and thus have accumulated a consequent breadth of influence. From whatever cause, the fact remains, that the names of Kirby, our first American State Court Reporter, Day, the first appointed official Court Reporter, Grattan, Cushing, Gray, Allen, Pickering, Metcalf, Wendell, Hill, Denio, Coxe, Pennington, Johnson, Paige and others have become indelibly impressed upon the minds of the profession, while many other names are comparatively unknown. Little importance is probably directly attached to this fact, however, since our reports are almost universally good and state reports are obtained in full sets on the basis of the states preferred.

English Reports.

American law having been founded upon common-law principles now and then finds it advantageous to trace some doubtful proposition back to its primitive origin.

When our own case law is inadequate such evidence is highly valued and some very important cases have been referred to the old English precedents for authority. An early Pennsylvania boundary case and the Dartmouth College Case are instances of where English conditions have entered into the question. While English decisions are only persuasive in authority over our courts, yet where the common law is by statute made the law of the land upon matters not otherwise covered then the old English common-law precedents may be said to be given practically imperative authority. To estimate these reports needs some exposition of their history since their peculiarities grew largely out of historical conditions.

Beginning with the Norman Conquest (1066) and running to the sixth year of the reign of Richard I (1195), a work entitled "*Placita Anglo-Normanica*," by Bigelow, collects from the original records all of the temporal and some ecclesiastical cases. From the sixth year of this reign the official records commence, and those between the years 1194-1199 are published in two volumes under the name "*Rotuli Curiae Regis*." Then follows Howell's *State Trials*, comprising thirty-four volumes, and bringing all of the reports from 1163 to the date of what was known as the *Year Books*. The English precedents may conveniently be divided into five epochs: (1) Parliamentary Period from the Norman Conquest to the *Year Books*; (2) a period of official reporting during the time of the *Year Books*; (3) a period of uncertain and irregular non-official reporting from the *Year Books* to the *Term Reports* (1785); (4) a period of private regular reporting from the *Term Reports* to 1865; and (5) the final period of orderly reporting by the Council of Law reporting from 1865 until the present day.

The volume of these reports varies considerably be-

tween the periods mentioned. Continuous reports in chancery as well as law date from 1500, but nevertheless some of them are next to worthless. The method of early reporting particularly presented so much difficulty that the personal element in the reports outweighed everything else. To give a decision orally and without notes upon a complicated situation and do the same fully and ably was beyond the ordinary judge's ability, and it is a wonder that they succeeded as well as they did for many of them are remarkable for their learning. But to add to this difficulty the necessity for the reporter to take what he could get from this hearing by a process of long notes or from notes taken by counsel, the difficulty is doubled. Therefore there is little cause for speculation why many of the reports are fragmentary or that succeeding reports of the same case sometimes differ materially.

The period of the Year Books was characterized by official oversight and regulation, but the succeeding period was one full of unreliable work. Some of these reports were taken from the notes of lawyers, presumed to be correct and laid down as authority. Again, they were made out from copies of the original notes, and it is even said were in some instances the offspring from the second or third generation of notes. Names of reporters dead for years were now and then affixed to reports. A quotation from Wallace well describes the situation: "Indeed it was warrant enough to call a book such a man's reports, that the cases in it, though manifestly copied from other manuscript were copied in his handwriting."

The personal factor having entered so largely into these reports it may be important to know what the relative standing of some of these reporters has been. No doubt among the very ablest were Lord Coke, Plowden, Burrows and Saunders. The reports of these men are

the greatest examples of the art and have never been surpassed. Lord Coke was reputed to be the greatest authority on common law of his age, and his reports were estimated so highly as to be referred to as "The Reports." But the reports of Dyer, Croke, Hobart, Leonard, Raymond, Salkeld, Moon and Williams were also of an excellent quality. Of medium worth only may be said to apply to the work of Ambler, Vesey, Sr., Atkyns and Vernon, while those of least value are the records of Gouldsbrough, Noy, Owen, Popham and Saville.

The reports of the fourth period, while of a private nature, nevertheless fell into two classes accordingly, as they were recognized by the court as authorized, and listed as regular; or were nonauthorized and listed as "Collateral Reports." Their respective values were not, however, measured by this discrimination. This rivalry with duplication of reports and contradictions between them prompted the English Bar to attempt a reformation of such conditions. The outcome was the organization in 1866 of the Council of Law Reporting, composed of members of the Law Society and Inns of Court and the inauguration of a system of "Law Reports" which proved of permanent character.

The "Law Reports" thus established have assumed and followed the divisions below given:

As first comprised there was a separate series for each court, including the House of Lords and Privy Council Appeal Cases. In 1875, consolidated into six reports, to wit: Appeal Cases, Chancery Division, Common Pleas Division, Exchequer Division, Probate Division and Queens Bench Division.

In 1881, cases in the Common Pleas and Exchequer Division are reported in the Queens Bench Division with the result that today there are four series, to wit: Appeal Cases, Chancery, Kings Bench and Probate.

Besides the method of general reporting in England there has also been published a number of works following the principle of selection. Smith's *Leading Cases* appearing in 1841 and republished through several editions is the best known. So also "*English Ruling Cases*," a work of twenty-five volumes, is another series of note. An American publication of selected English cases with elaborate notes likewise exists under the title of *Moak's English Reports*.

A process of selective compilation has dated from the year 1891, when a reprint of English cases from 1785 still considered valuable was begun, totaling at present over 100 volumes. Since then there was started in 1900 a publication of "*English Reports Full Reprint*," which purports to reprint complete all of the English cases from the earliest times, of which about 100 volumes have already appeared.

CHAPTER VIII.

ESTIMATING WITNESSES.

Witnesses and Testimony in General.

All evidence with the exception of exhibits must be in the form of testimony. Even so-called circumstantial evidence generally contrasted with testimonial evidence is only one species of testimonial evidence. It comes none the less through the testimony of the witnesses because it is circumstantial. Exhibits offered in evidence are the one exception where evidence reaches the court or jury without receiving the stamp of a witness, and even these must be identified through the medium of a witness. We see at once how important it is to estimate the character of this medium in so far as it is made up of elements common to all human beings, and also to give some especial consideration to what may be designated types of human nature on the witness stand.

The medium of communicating evidence to court or jury should be an absolutely transparent and colorless instrumentality imparting nothing of its own nature to the evidence, but alas, there are at least two distinct ways in which this medium may modify the evidence and thus render it the object of the most cautious scrutiny. First, the medium itself may not be a good receiving instrument, may not be able to record the facts accurately, or even if this be accomplished faultlessly may not, on the other hand, be able to deliver them up and express them perfectly.¹ Both imperfections may occur in the same person although entirely distinct processes. On account of some defect in the physical senses of seeing, feeling, hearing, tasting, touching or smelling,

¹ Elliott's Work of the Advocate, 254; Train's Prisoner at the Bar, 224.

an individual may be utterly incapacitated for receiving correct impressions. Many more people are defective in one or more of these avenues of sensation than is generally supposed. Tests disclose that but few people in fact are normally acute and receptive to stimuli. They are either hypersensitive or apathetic and atrophied. Faulty vision, partial deafness and impaired smelling are human defects too common to longer cause comment.

Science is in recent years giving us a warning signal of the fallibility of the senses as disclosed in the investigations of the experimental laboratories and the work of such men as the late Hugo Munsterberg of Harvard University. Various phases of the general subject of psychology as applied to the law is also treated in several articles in *Case and Comment*, May, 1913. It is a strange paradox of nature that the instruments which the human mind has intuitively accepted as practically infallible, turn out to be incredibly unreliable. Legerdemain has long exhibited the blunders of the eye to a credulous public. Ghosts have usually been captured in the grave clothes of the mind. Delirium tremor snakes turn out to be the blood circulating across the retina of the eye. Psychology now calculates the deceptive possibilities of color blindness, after images, fatigue in shifting the threshold of sensation, tactile areas of the body, different zones of sound stimuli and many other problems of mental illusion. How vitally important is such a discovery to the testing of witnesses? It is a field full of such possibilities of error that no lawyer should fail to give it the most careful attention, for so long as witnesses come upon the witness stand untested, the opposing attorney is all that stands in many cases between the most pernicious legalized error and the cause of truth.

However, impaired sensation is not always to blame for erroneous testimony, for most of our impressions are really ideas instantaneously built up by inferences, and in many persons these inferences are never analyzed, much less chal-

lenged, and are accepted as though they had come "sealed packages" delivered first hand from nature. To make matters worse, these false interpretations are in some morbid cases predestined from former experience. The color of the thought, the thing most in the eye of the mind making the wish the father of the conclusion, convert sensations into semi if not full blown hallucinations. The only key to unlock the fallacy of such inferences is to discover what dominant idea or strain of experience has become a lode star to the witness. With this clue the mind of the witness may be sometimes pried loose from the delusion. A natural instinct, however, to resist any effort to disclose a human imperfection, physical or mental, makes the process a stubborn one for the lawyer. It can be accomplished more often through a matter-of-fact sympathetic mode of treatment much better than by sharpness and especially ridicule.

Moreover, few persons are gifted with the art of adequately expressing their own ideas and experiences. When the experience can be worded in simple answers there is not much difficulty, but to give a graphic description of a scene in all of its coloring of impression or to narrate an account where several threads of action meet and interweave is generally beyond the ordinary witness. The situation has to be built up by the examiner as his imagination can best anticipate, and such a procedure verges on objectionable questioning. Thus the peril to the truth and justice is obvious in all of these instances where the witness is endeavoring to tell the truth, but this leads to an especial inquiry into those cases where the witness has imposed other motives and intentions upon the testimony.

Bad as it is when the human machinery for receiving and delivering the evidence is imperfect and out of order, the situation is still worse where the witness has some ulterior purpose to be achieved in the process other than the transmission of facts. This blight assumes two forms: one where

the witness purposes to affect the testimony in some way, and the other where he proposes to display some personal quality which he possesses, or gratify some personal desire which he harbors.

As a general rule, such witnesses accordingly take on an active role. The one having a definite plan or story to construct will not wait to be drawn out, but will be anxious to get his parts together. When this is suspected the lawyer may test the intent by breaking into the story and divorcing the parts. If then the witness shows an impatience and promptness to return and mend together the gap and persists in the face of obstacles the hypothesis of falsehood is a reasonable one. Or, on the other hand, if the purpose is to exploit some personal vanity, the witness will unconsciously seek corroboration of his success in the eyes of the jury or audience, while if it be a secret satisfaction of some form he will covertly watch the person or persons against whom it is directed. These cases, however, will be considered more fully under types of witnesses to which discussion we now turn.

Since the witness is bound to put some kind of a stamp upon the evidence, it is pertinent for the lawyer to estimate the particular character and effect of these stamps. Like so many blades of grass there exists an infinite variety of individual modifications among witnesses, but nevertheless many of them present a dominant characteristic, and these may be roughly grouped under a series of types which warrant especial attention. Thus from the standpoint of the end to which he orders himself in the process, witnesses may be divided into the artful and the artless. Again from the basis of voluntary expression they fall into the extremes of the voluble and the reticent, or once more from the viewpoint of the mental state of the witnesses there may be several classes, to wit, the indecisive and positive, the dogged and agreeable, the nervous and stupid.

Artful and Artless Witnesses.

The perfect example of an artless witness is the innocent testimony of a child. Here no ulterior motive, design, conceit, whim, foible or vanity moves to the adoption of an assumed air, to the modification of the facts, or to the acting of a part. This medium comes the nearest to presenting a transparent instrument that is possible and for that reason the simple words of a child are among the most powerful forms of evidence. There are also many people of such unassuming manners and expression as to constitute practically artless witnesses. Their only idea is to answer truthfully the questions put to them and their evidence is correspondingly convincing. However, the people of this class being usually outside of the pale of litigation seldom appear upon the witness stand. This is true only of the extremely artless, for the greater number of witnesses are more or less artful. Much of it, however, is of a somewhat excusable character growing out of self-esteem. Many questions of a more or less delicate nature unavoidably come to the front in trials at law, and the witness, out of a sense of embarrassment or modesty, does not disclose freely without pressure, and is inclined to reveal no more than is literally demanded. When such evidence is important it must be gotten at all hazards, but this can best be done by showing a proper respect and appreciation of the witnesses' refinement. Sometimes a few words in justification of revealing such facts makes the task easier for the witness, but usually the advocate should take the lead, formulating questions which put the matter into technical phraseology and answerable by a simple "yes" or "no" even though the question be leading. Leading questions are proper in the case of reluctant witnesses. Bullying methods of forcing the witness into painful embarrassment produces a bad effect upon the jury, even though the material be important, for human nature revolts at making a needless

slaughter pen of the emotions. The genuinely artful witness, however, has no such refinements of character. In his worst form he constitutes the liar, the bigot, the schemer and the hypocrite. The artful witness may be said to be composed of two species, to wit, the untruthful and the posing witness.

The Untruthful Witness.

Here again we observe a marked difference between two varieties of witnesses, both of which are untruthful, but while the one is spontaneously guilty, the other exercises premeditation. The one lies from force of habit, the other deliberately plans to tell a false story. The former prevaricates without system, simply fits an answer to the particular question, probably following a primitive impulse to ward off and preserve secrecy of the real facts. He exhibits a low form of cunning which usually accompanies only an ignorant mind. This witness, falsifying only in spots, is not so easily detected by behavior. He is generally indifferent as to outcome and displays an air of comfortable composure. To a close observer there is usually a lack of "tang" to his words. They have the rambling tone of remarks rather than the decisive convincing ring of the truth. Psychologically the spontaneous liar is without mental conviction. Of course to size up a witness will do no good unless capital is made of the situation. The testimony may be shot through with falsehood, but unless the jury comes to a realization of the fact, nothing has been accomplished. It is necessary therefore that the lawyer follow up his suspicions with proof of their correctness. The falsifier must be led into inconsistencies. The great specific for lying is more lying. With no apparent aim and in an indifferent manner the examiner applies a tweezer and pulls out this flap of evidence, and that, inducing further explanations upon suspicious points and eventually by skipping from one place to another in the testimony producing

such a confusion in the mind of the witness that his testimony becomes contradictory and incoherent. When a contradiction is made or an inconsistency developed it is a very unwise thing to flaunt it before the jury and challenge the witness with it, for the same native cunning may devise an astonishingly clever explanation within the moment or with an air of injured innocence refer the variance to a temporary lapse of the memory. And it is equally unwise to demand a repetition of the dangerous statement for the purpose of emphasis before the jury, for the witness, scenting trouble, will reveal more discretion than the lawyer by either withdrawing the statement altogether or by modifying it so much that its value is lost as a contradiction. The chagrined advocate having allowed the fish to throw the hook out of his mouth may now make matters worse by administering a stinging rebuke to the witness, with the result of much discredit for his own blunder and quiet resentment in the jury. The time to exploit advantages gained over a witness is in the summing up of the evidence, unless in special cases a witness confronted with his own contradictions is compelled to admit his falsehood or his lack of knowledge, or is thrown into such confusion that he makes blunders where none in fact should exist, thus ruining the force of otherwise good evidence. The examiner must be guided in selecting the proper course largely by the cleverness revealed in the witness, and the importance and inexplicable nature of the contradiction. A witness put upon the defensive is from that moment a harder proposition. To antagonize a witness early in the testimony closes more than one door to desirable evidence.

The basis from which to direct an attack upon the truthfulness of testimony is the same background of natural order which makes falsehood upon the witness-stand so precarious. The whole world of things in which all events occur is one complete mosaic of parts, all fitting precisely together. Not

only do all things fit and relate into their surroundings, but they leave traces of their presence or records upon such environment. To remove a pebble therefore literally shakes the earth. Moreover, these relations of an object to things about are almost incalculable in number, and yet people who live in the midst of such surroundings have a wide, general working knowledge of these relations. At once the difficulty of artificially making a statement of fact and keeping it supported by still other fictions, or by smooth dovetailing into real facts, is made apparent. There is bound to be incongruity and inconsistency somewhere, or else it would cease to be a falsehood, for a thing which harmonizes with all accepted knowledge must be and is adopted as true. The problem of the examiner is to select the most advantageous point of approach. An unexpected angle of view is almost sure to startle the witness, and disconcert his powers of adjustment. With no time to weigh possibilities, and no reason to delay answering so simple a question, he makes a pure guess or betrays his perturbation. It is needless to add that guesses are almost always wrong. A rapid fire of questions from various tangents is the surest test of veracity. Truth needs no adjusting, for its parts are all in place and the honest witness relies upon their own consistency. The prevaricator must produce consistency and this impossible task results in his downfall.

The second variety of untruthful witness is not necessarily a liar at all, using the term to express an habitual characteristic. Many times unfortunate circumstances have made an honest person desperate to the point of deliberately fabricating falsehood upon the witness-stand, and to save a life or even honor, both men and women have been known to freely perjure themselves, while of course with people of lower ideals the practice is not uncommon. Anything to beat the law is a form of slogan to the unprincipled many. This witness is a premeditated planner. He has a definite pro-

gram to carry through which is to defeat the truth. He may recognize that it is a doubtful undertaking, but he relies upon his preparation and shrewdness. A story is thus prepared to account for the damaging facts in some other way, or it is designed to make the person charged appear incapable of having committed the deed. The story may rival the very naturalness of nature itself, but the obstacles are usually insuperable. There must be a horizon of details somewhere which no genius could ever match together. It is thus the preparation of the witness pitted against the strategy of the examiner. But the very plan itself, regardless of any of its particular parts, because of its reaction upon the behavior of the witness, will present a first flaw in the armor. If it be an unfortunate individual of the first class, the strain and anxiety to make the plan succeed will lead, at the suggestion of the attorney, and in the illy concealed eagerness of apparent success, to add more detail than had been anticipated with the inevitable result clearly pointed out.

But the unprincipled schemer is more wary. He is distrustful of any probing into niceties and shuts up like a clam when the discussion gets upon unfamiliar ground. Yet he knows one thing and that is, that he must get his story told. He is uneasy lest he be shut off or dismissed before he gets this end accomplished. It is not a statement he wishes to make, but to give a connected narrative. This purpose affords the examiner his opportunity. With no indication of his motive he innocently breaks into the story and thwarts it by leading elsewhere. He watches closely the symptoms of impatience and tenacity of purpose to return to and push the narrative. The examiner attempts to extend the borders of the story and observes the resistance to such inducement. This is evidence that there is a framed up story and that the schemer knows the importance of not passing over the dead line. If he were telling truth he would have no such hesitancy, there would be no such sharp

distinction between what he knows so positively and what he knows nothing about. Since this witness is too wise to lie indiscreetly, he may sometimes be effectively driven into a corner by sharp demands and his open and shut policy challenged for explanation. When this type of a witness resists all efforts to be led outside of his prescribed limits and thus entrapped, it will be necessary later to carefully compare the story with other evidence and known facts and thus disclose any lack of consistency. In this species of witnesses, if once the wedge of falsehood can be driven into the testimony, it falls as a body into a worthless mass. A witness who has plainly falsified in one part of his testimony has rendered a golden text unbelievable in the remainder.

The Posing Witness.

Another species of the artful witness is the posing witness. Of this class there are also at least two well defined variations, namely, the bigot and the hypocrite. They both represent exaltations of self-esteem. They have no such active program as the falsifier and the schemer, but none the less have a conscious line of conduct in mind. The peculiar form in which the self-exaltation of the former species manifests itself is in an intense desire to display one's own mental superiority to others; while in the second species the individual assumes to occupy and borrow the finery of some virtue which is in fact and known to the imposter to be wholly lacking. The first offender actually believes in himself, the second only pretends to believe in himself. Both of these characters often appear upon the witness stand.

Now the bigot cares little or nothing about the outcome of the case. He has usually had much to say in the community about the case and hence naturally gravitates toward the witness-stand. To him it furnishes an opportunity to be conspicuous and he intends to get the full benefit of the

chance. It is not his purpose to make capital out of the evidence so much as out of the examiner. He intends to show that he is equal to the occasion and that no lawyer can take his measure. Forthwith he assumes for the purpose in hand that the advocate has singled him out for a performance and consequently he bristles with expectation. He usually begins by presuming a fine disdain for the difficulty of the questions put to him and uses such terms of aspersion in quick retort as though the questions were too simple a trap for him. "Of course", "certainly", "no doubt about that" and other similarly flippant remarks in a semijocose vein open the farce. This is frequently followed up by attempting a stranglehold upon the examiner. He throttles the question with a short "yes" or "no", forcing the attorney to work hard in the formation of his inquiries. Then he probably rises to the climax of his superior powers by demanding sharply whether the examiner means this or that by his question. He may even comment upon the unskilled nature of the interrogation. It is not long before this fellow does become conspicuous, but not in the way he fondly presumes. The danger in this witness is not that the jury will fail to detect the jack or "smart Alec", as he is commonly termed, but that the examiner may inadvertently be taunted into stepping outside of the official dignity of the profession to trim the impertinent ass and possibly, in the mixup with the shallow conceit's execrable side-arms, may be worsted in the bout. Under no circumstances should the lawyer put himself, or allow himself to be put upon a level with such a witness. Therefore he must display the same unruffled scientific patience with which an animal trainer would deal with his charge. No retort and no argument should ever be engaged in with such a witness in the hope of putting him down. On the contrary, the advocate should even pleasantly encourage more of the fulsomeness of the fool until his bigotry actually blooms into a friendly commiseration for the poor attorney opposite

to him. The opportunity has now come to put this caricature of a man to some use. The general weight of his evidence has already been destroyed, but the examiner may have some special admission or corroboration which he wishes to obtain from this witness. Positive evidence from such a witness has of course been much weakened, but an admission or corroboration calls for no mental assimilation or judgment on the part of the respondent. According to an old authority the following expedient has worked exceedingly well. The psychological moment comes when the fellow has been allowed to score an unusually good hit and to have raised a laugh at the examiner's expense. He is now in an ecstasy of triumphant excitement, and at once, in an off-hand way as if to ward off the merriment, he puts his question. If well put it will catch the victim off his guard and the answer desired will come like an undertow to the main surf of exhilaration.

Another advantage to be gained from such a witness is the use to which his evidence and behavior may be put by way of contrast in heightening the emphasis of good evidence from another source. Thus he is not only assisted in ruining his own influence, but the same ruin is made to act as a foil to strengthen the evidence of others.

The hypocrite, on the other hand, poses in an entirely different way. His concern is not so much in the relation which he sustains to others, for he may be indifferent to the presence of the audience, but his eye is upon himself. He realizes great satisfaction in assuming to be one thing although in reality not living the part. This attitude, when persisted in, becomes an habitual ingrained mode of life expression. The hypocrite may not be an "empty brass" because of bad motives, but because he is only half a man in will power. Be that as it may, the hypocritical witness generally displays great fidelity to the role which he assumes. It is a religious duty with him to be absolutely consistent

with his ideal. Thus with his attention always holding in mind the part, he frames his answers accordingly. Externally he has none of the flamboyancy of the bigot and may seem to be an exceedingly grave and conscientious person.

The particular form of hypocrisy here considered is that which takes on the part of the absolutely impartial exponent of the truth. He prides himself upon his ability to rise above pure feeling, interested motives or bias of any kind. He suffers from a delusion of a peculiar kind. He measures his statements with painstaking care as to their veracity, but the error is that they seem true and become true to him because he says that they are true. Whenever therefore he begins to preface his replies with "let me think", "not quite sure", "not clear", "believe", "presume", "to the best of my recollection", he is incubating sanction in his own mind to a falsehood. His evidence will, consequently, border closely on facts. He weighs his words carefully, not for the purpose of separating truth and falsehood, but to combine them whenever his ideal insists. A half truth is a sufficient basis from which to make a whole truth. Whether he is juggling a half truth into a whole truth or a half falsehood into a whole falsehood furnishes a problem for the examiner. Usually the most successful way of handling this witness is to appear deeply appreciative of his sense of fairness and then to cut the evidence into fragmentary parts and put the issue of truth or falsity flatly with reference to each one of these separately. With no temporizing words to sanction his sleight of hand overlapping he will generally shrink from openhanded perjury and the truth will be forthcoming.

Still another species of the untruthful witness is the "*non mi ricordo*" type, of which there are two varieties, one being malicious and the other weak. The former can not remember facts adverse to one side, but recalls clearly circumstances pointing the other way. Some notable examples of this class were exhibited in England before the House of

Lords upon the trial of Queen Caroline in 1820. These specimens were Italians and their favorite expression, "*non mi ricordo*", was used so profusely that it became for some time the accepted appellation for those witnesses whose memory was so adjustable to the needs of an espoused cause. "Witnesses are daily adjured to remember; to try to remember something which counsel especially desires to put in evidence, and on the other hand the most scathing and indignant comments are made upon the partiality of the memory which recalls so many things, all of a kind, and refuses utterly to produce anything whatever, of another kind."

The possession of an infirm memory by a mentally and physically sound person is so remarkable as to at once arouse suspicion, and if it be of the spotted variety it speaks eloquently of fraud. In any case a faulty memory creates a presumption against the credibility of any of the testimony. The most successful mode of treatment is to develop the contrast between the things remembered and the things not remembered by drawing out as many answers of each as is possible until the jury, becoming wise to the situation, reverse its inference and classify the thing remembered as false, and those forgotten as true. The weak witness of infirm memory is overly anxious to avoid perjury, and his timid, cautious and conscientious disposition leads him to forget that his oath not only requires him not to tell falsehoods, but also to tell what he knows. He does not understand that he is bound merely to his "best knowledge and belief", and hence he hesitates, then doubts and finally concludes not to venture the revelation of things which under other circumstances would have been perfectly certain to him. Sometimes an explanation by counsel of his duty will encourage an answer, but usually his evidence is of little value and he falls an easy prey upon cross-examination.

Voluble and Reticent Witnesses.

Leaving the question of the artfulness to be found in witnesses, let us consider the witness from an entirely different basis, that is, the volubility or lack of volubility in the witness. This is a phase of human nature differing widely among normal persons. The extreme cases only deserve mention here, because the ordinarily normal witness presents no particular difficulty to the advocate. There is on the one extreme the habitually garrulous individual talking incessantly and irrepressibly, and on the other the taciturn, dogged, silent person, who never has anything to say and seems to begrudge the effort necessary to talk at all. The first kind may be combined with irritability, and the latter with stubbornness, and when these qualities are added they produce witnesses demanding especial attention.

The voluble witness, especially if partaking of the garrulous characteristic, is almost certain psychologically to be of a high strung temperament. There is a great deal of fuss and noise, whether it amounts to a definite "get up and go" or not. Sometimes it is all breeze, but again there is action combined. Many times volubility is merely an exuberance of nerve energy seeking outlet and is relatively innocent, but now and then it is connected with action and at once assumes a damaging form. Often found among a certain class of women, the latter form degenerates into the scandal monger or the proverbial shrew. Now this species of witness is generally truthful enough, but lacks in the sense of the proprieties of bounds. No value is placed upon silence and the witness box becomes a signal for the immediate discharge of a consignment of fireworks. To be sure, sometimes they turn out to be no more than a few Roman candles and some pinwheels, but now and then full sized cannon crackers and skyrocketes are added to the general fusillade. In the first place, such a person is always an interested witness in the

outcome as well as an interesting witness to the jury and the audience. There will be no sleep in the courtroom during the celebration. At the first cackle or fiz the attention of every hearer pricks up. For this reason it behooves the advocate to have a care. Surprises are latent in the atmosphere. For as already stated, this witness takes an interest in everything and quickly assumes a partizan zeal on one side or the other. Moreover if it be a woman she has something worth saying and is going to say it. That is the rub; she is going to say it and has no idea of merely answering questions. If the examiner therefore is not careful she will have him careening in a sailboat, threatening to capsize at any moment and pulling frantically first at one rope and then at another in an effort to take in sail. If, however, this be a specimen of the first class, a sharply repeated admonition to answer only the questions asked will sometimes repress the flow of language. The check, nevertheless, will serve to even heighten the nervous tension and sometimes induce an abused air. Of course if this be the counsel's own witness he is afraid of that impending mistake of overdone-ness. If he lets her go she says too much, while if he suppresses her she betrays her interest too keenly under the repression, and if he methodically starts and stops the machine his own lack of confidence in the witness becomes apparent. The problem is hard to solve satisfactorily. Probably, when possible, it is best to treat her weakness as a mere incident of weariness or result of strangeness of the witness-stand, or of what is expected of her or by some wisely interpolated remark treat her testimony as if of only incidental importance anyway, but if she be the opponent's witness the case is different. Then you are willing and even desirous that she fully exhibit her talking ability. Unusual facility coupled with a penchant for exercising the oracular power irrepressibly are marks of inventive and improvisation proclivities, which fact may be used in depreciating the value

of her testimony at the proper time. On one occasion a woman under charge of slander, upon being facetiously taunted by the prosecution with the appellation, "Aunt Beckey", turned suddenly and furiously upon her tormentor with a tongue lashing, much to the satisfaction of the attorney, the hilarity of the audience, the knowing surprise of the jury and the chagrin of her own counsel. She was promptly convicted.

In the case of *Medlin v. Morris*,² the testimony of certain women witnesses was said by Judge Lamm to be "more voluble than valuable", and some of it, he said, might well "be referred to that inflammation springing not unfrequently in persons of a certain temperament when the sweet milk of domestic love and felicity is changed into the gall and bitterness of discord and angry strife over antagonistic claims to property."

At the opposite pole in temperament and habit of mind is found the reticent witness. This characteristic of speech is often as much accentuated as the opposite habit of garrulity. The person, usually a man past middle age, has practiced inhibition of all forms of speech, talking, facial expression and even bodily movements, until he presents an immobile, expressionless and dogged appearance. However, there is likely to exist behind that stolid exterior a strongly contemplative and cautious mind. He is naturally suspicious of inquiry of any sort and particularly of compulsory quizzing. Disputing in his whole nature the right to extract statements from a man unless he wishes to make them he sets himself into a frame of mind hostile to his interrogator. If he be an unlettered man he will substitute a shake of the head for a "no" and all of his answers will be given in the fewest possible monosyllables. A request that he relate what took place will probably be forestalled by some such epitome as, "not much of anything", "I didn't notice particularly". He

² 243 Mo. 260, 270, 148 S. W. 85.

will neither narrate nor describe nor venture a comment upon anything. No witness not trained in life to the habit can play the role of reticence as does the genuine case. He who merely acts the part will battle with his impulses, which constantly pull the other way and disclose the motive. But the reticent witness may or may not have an intent at stake; he may not appreciate the need of talking under oath or of telling what he knows, and he may do so fully, the result is the same, a barrier of habit well near makes it impossible for him to be freely responsive. Yet he is not altogether hopeless. His nature too will respond more readily to some stimuli than to others. Somewhere within the recesses of his nature he cultivates a secret satisfaction and form of interest. It may be the love of a gun, or a horse, or it may be a powerful right arm, some physical prowess, or it may be an aptitude for some form of labor, or a pride in some old ancestor, or a war experience, or a wonderful memory the talk of the community, "which runneth back to the memory of man to the contrary notwithstanding." Now let the wise counsel open the way a little by a few introductory questions involving the "parent lode", and the man will visibly relax, and if that wonderful memory be piqued to recall some of your facts he will be childishly pleased to prove its efficacy. A friendly flow of intercourse once set up, the otherwise baffled attorney may then elicit by a course of short and simple questions, the material which he desires. Thus again it is evident that the lawyer should be well versed in the foibles of human nature.

The Subjective Witness.

Finally we come to an extensive class of witnesses of many shades and varieties, but having in common the trait of suffering, if that term be employed to express the quality, with the presence of a dominant mental state during the or-

deal to them of a public examination. It is a condition of the nerves and feelings rather than of the intellect, and it may be only a temporary strain induced by the tension of the occasion. Among the more prominent of these varieties may be noted: the positive and indecisive, the contentious and agreeable, and the nervous and stupid witness.

The Positive and Indecisive Witnesses.

Here again we have a contrast between two extremes. They are both more often found among females than males, because a nervous tension is usually the background for the manifestation. This nervous "tight wire" state takes on two widely divergent characteristics according to whether the person responds easily to stimuli or is constitutionally inhibitive. The latter witness will put the brakes on the mind as soon as the question and an answer is suggested. The brake of inhibition comes down upon the reply with a decisive snap, while the positive ring in the voice and firm set in her mouth works back like a reinforcement lock to hold it secure. And once anything is said it is hard to get it unsaid. Like a story that is told, a chapter that is closed, her mental instinct is never to turn back, but to go on. This witness never questions what she has said and holds tenaciously to its exact form, relaxing her grip with the utmost reluctance. She abhors uncertainty, and feels more assurance in positive statements adhered to than in corrections made for the sake of truth.

A witness of this kind makes a good first impression upon the jury. The dogmatic statement rings out with conviction. The trouble is that the evidence comes out in marble, and her own counsel finds it difficult at times to erase his own and client's name from the tombstone. When the opponent's witness, the most practical plan is to lead her to make and reiterate statements which evidence will later show before

the jury to be inharmonious, if not contradictory. This witness will either prove very strong or very weak, for when a positive person makes a mistake the confidence which has been inspired is rudely shaken, and the reactionary suspicion is likely to be unwarrantedly excessive.

Occasionally the positive witness happens to be a man of violent, uncouth and combative disposition, who has no appreciation for the refinements and culture of society. He is a backwoodsman of the uglier type, self-willed, ignorant and insulting. Not adverse to a personal row in the courtroom itself, with no respect either for himself, the attorneys or the court, he resorts to bullying methods upon the slightest provocation to let the people know that he doesn't intend to conform to any of the "damned" authority of the lawyer. Of course in later days this extreme type has almost disappeared, but modified specimens still exist to intimidate the inexperienced examiner. The veteran at the bar meets this man with an especial reserve of calm and frigidity. He moves against the dragon with a colorless, methodical, mechanical, personless insistence that is somewhat disconcerting to the smoke belcher. The latter sees here none of the evidences of carnage, and that a man fighting a machine occupies a somewhat ridiculous position. It is a case of Don Quixote and the wind mill. Gradually he subsides. It is a conflict skilfully diverted by the examiner from a contest between the witness and himself, to one between the witness and a machine, the machinery of the law, with the result of a complete victory for the machine, shall we not rather say, for the wise?

The indecisive witness, on the other hand, is afflicted with a distress of uncertainty. Generally a person of good intentions, yet this witness seems to stand at the meeting of many paths from among which she is unable to select. She seems to be beset by the apprehension that no statement which she can possibly make will sufficiently express what she desires

to say and should say. She gives her replies in a hesitating, cogitating, shrinking sort of way that reveals a total lack of confidence, and once the words are out, she hastens to modify them in some particular as though she had been inadvertently betrayed by them. If questioned as to what she has said she will immediately doubt the accuracy of her own words. A frame of mind of this kind calls for a large measure of sympathy. Her whole body and mind is a highly strung instrument and accustomed to respond quickly to many stimuli. Upon the witness stand a dozen possibilities for every statement dart through her mind, and she is conscientiously unable to weigh and measure them upon the spur of the moment. To be sure there is a kind of indecision which arises from a general habit of loose observation. Few people see more than a modicum of detail in anything, and if they be unaccustomed to taking a positive stand upon such observations, they are very likely to be found looking through a maze of experience without being able to categorize any of them accurately.

The first antidote to administer to a witness laboring under nervous strain is to relieve the tension. A mild bodily expression of some sort is a very efficacious side escape to nervous energy. Athletes chew gum to relieve tension. A nervous person upon the witness stand should hold some article in his hands. Then again tension is reduced in a witness by the examiner exhibiting signs of ease and relaxation, sometimes by walking about and not watching the witness, sometimes by a nearer and sort of personal private conversational style of address, and sometimes by moving further away. The close personal attitude and tone usually succeeds admirably with children. Often the familiar use of the witness' first name will have a peculiarly soothing effect. Under no circumstances should the lawyer himself show symptoms of impatience or a lack of cordiality. Secondly, this witness should seldom be hurried. If on direct exam-

ination, the questions should be made as simple as possible and be put with ordinary speed, but in cross-examination time to weigh the question only seems to multiply the witness' confusion, for the trouble is often one of multitudinous suggestion. The evidence from such a witness never makes a strong impression upon the jury and is sometimes next to worthless.

Contentious and Agreeable Witnesses.

These witnesses take their cue of procedure from suggestions of the examiner, but they act in directly opposite directions. The former by an auto suggestion assumes a contrary position upon every question asked. The more definite and plain the natural and expected answer, the more perversely he takes his stand upon the contrary. He probably has the reputation of being the contrariest man in the community where he lives. To be combative, contentious, and sometimes argumentative has become bread and meat to his existence. It is not the truth of the proposition in which his interest centers, but in the reaction of mental resistance. Because of this he can not be reasoned out of a position for he seldom listens attentively to the opposite side. If he be not negatively sullen and stubborn, as is sometimes the case, he will be prone to talk back and disagree with the attorney upon the slightest opportunity. His wrangling, disputative disposition is not usually ungentlemanly, but very provocative, for he holds up the progress of the trial and causes continual haltings and delays. The danger with such a witness is that the examiner is likely, if not cautious, to be thrown upon the defensive in a personal controversy entirely outside of court procedure, a little side show which may prove very entertaining to the jury and very tiresome to the judge. The outcome of such a diversion is generally to the disadvantage of the examiner, first that he should

have been drawn from his professional platform to indulge in a personal scrimmage, and secondly, because the witness choosing his own "well-oiled arsenal of coarse wit epithets" will usually best his learned adversary. Now and then a lawyer of exceptional wit and caustic vocabulary can riddle such a witness, but it is a dangerous attempt. Even if successful nothing is gained for this man recognizes no defeat and returns to the fray more vigorously than before.

Provoking as it is to have a witness deny at every turn and refuse to admit matter already in evidence except upon his own conditions and qualifications, yet nothing will succeed except infinite patience. The less indication there is in the form of the question as to what the advocate wishes, the less suggestion and opportunity will there be to this headstrong witness to oppose. Sometimes a deliberately thrown out misleading cue will bring the right answer. No attempt to correct or modify the answer by direct question should be made, but such trimmings should be made indirectly through the putting of other questions involving the same point. The jury will probably find the evidence of this witness difficult to properly unravel, and care should therefore be exercised by the attorney in carefully analyzing it for this reason.

In startling contrast to the above horny old vulture is that of the agreeable witness. The manners of this person are usually gentle and courteous. In fact, the attitude far from that of defiance and antagonism to the examiner is one of desire to please and placate. The witness seems not so much interested in the meaning of the question as to what kind of an answer the questioner desires. She, for it is generally a woman, as the contentious was a man, apparently waits for the interrogator to formulate her reply. She is partisan only to the examiner immediately in front of her. She has no choice between the prosecution and the defense. They are both alike to her, nice gentlemen or formidable officials to be

accommodated so far as lies in her power. Therefore at the solicitation of either she will acknowledge a mistake, add to or detract from former statements. Agreement seems to her the only amiable recourse. So much pliability, however, soon proves irritating to the advocate, for the evidence takes on the hue of gelatine, and unless some stiffening can be infused into the mass it will amount to practically nothing. Since a mild form of timidity is apparent to the jury in this witness any effort on the part of the advocate to belittle the witness through sharp rebuke, sarcasm or ridicule will engender sympathy on her behalf. Abuse of a weakness which tends toward gentleness is a dangerous expedient under all circumstances. At any rate the evidence can be little more than harmless. Hence to pass it by as lightly as possible and to direct the attention to more important testimony is far better.

Nervous and Stupid Witnesses.

Some people constitutionally act quickly while others act very slowly. When the type is pronounced, the former will have a perfect dance of the impulses to respond. Thought will usually follow the act. The latter will be so slow that one might infer an excess of thought while there may be in fact but very little. The nervous witness is difficult to manage. There may not be a lack in the thought which the witness has in mind, but the power to express it in an orderly way seems impossible. The difficulty is not with the ideas, but with the language. Like a stuttering person the answer will not come at all, or the words tumble out two or three in a heap. Contradictory expressions referring to different things will arrive in close companionship. "Yes" and "no" will be joined to express a half truth, while "I don't know" comes close behind. The phrase "I believe so" or "I don't think so" are expressions to which this class of witness is partial.

Just as with former species of trying witnesses it was observed to be bad policy to publicly chastise so it is in the case of the nervous witness. Equilibrium to shattered nerve cells can not be restored by more exciting stimuli. Naturally too excitable, and possessing an anatomical nerve condition beyond perfect will control, it is folly as well as a species of brutality to unduly agitate such a witness. When moreover the subject-matter is of a harrowing nature in addition, a state of hysteria if not complete collapse is the possible result. The evidence of this type of a witness is usually valuable, for in spite of some incoherency there is a manifest anxiety to tell the truth. 'Such an individual has not the nerves to be a liar. The witness-stand to the nervous witness is a species of torture. The situation is exalted in her imagination far beyond the reality.

The public gaze and conspicuous position is almost terrifying to her sensitive nature. Therefore the examiner should be a gentleman first and should use all of the devices heretofore pointed out to ease down and simplify the ordeal. Such a procedure is not only humane but is scientific and professional as well. When nerves are thus encountered one should have the skill and instincts to estimate the situation sanely and sympathetically. With calm, gentle and gracious deportment and manner of speech any lawyer may win the confidence of a nervous witness and tactfully assist them to give whatever evidence is obtainable. He does more than this, he wins the silent approval of every person in the courtroom.

The stupid witness does not, as a rule, induce much sympathy. The impression probably exists that a person so dull that he can not understand plain questions, or so stupid that he can not forecast to some extent the effect of his own words, has no feelings that can be easily hurt, and to some extent this is no doubt true. The obstacle of dullness can be overcome in most instances by a repetition of the question or

by a restatement in simpler terms. The advocate must be alert, that the witness does not place a wrong interpretation upon a very simple word or phrase, for dullness and ignorance are practically kindred conditions. The very simplicity and common usage of the term may throw the examiner off his guard. It must be remembered that some people possess a vocabulary of less than five hundred words, while there are estimated to be at least seven thousand adjectives alone in the English language.

The attitude of this witness, however, is one of extreme docility and honesty. Having often in life been reminded of his opaqueness, he has come to look upon it as an accepted fact, and consequently has little heart or confidence in his own powers. He accepts all questions at par value and of equal consequence. Of course he has little or no appreciation of the situation or merits of the case. He believes what he has been told, and like a dumb beast acts up to the best of his understanding. Evidence from such a witness must not be undervalued, however, for his very inability to be a crook from lack of intellectual penetration sometimes makes his evidence of the most convincing, beneficial or damaging character. Moreover, such naive simplicity often leads the examiner into difficulty. Not being able to discriminate between evidence for and against his own cause, if he should happen to be so interested, he is likely to startle his counsel at any time by a most unfortunate divulgence. For this reason the question put to this witness should be considered very carefully. Naturally evidence involving any element of judgment or opinion is not only hazardous from this witness, but also worthless. He is capable of testifying only to the most ordinary facts of experience, and any attempt at complete description or narration needs to be checked up on the order of time and place. All in all this witness according to circumstances may be very valuable or a useless asset to the case.

In an action of assault, where a stone had been thrown by the defendant, such a witness was examined and testified as follows: "Did you see the defendant throw the stone?" "I saw a stone and I'm pretty sure the defendant threw it." "Was it a large stone?" "I should say it wur a largish stone." "What was its size?" "I should say a sizeable stone." "Can't you answer definitely how big it was?" "I should say it wur a stone of some bigness." "Can't you compare it to some other object?" "Why, if I wur to compare it so as to give some notion of the stone I should say it wur as large as a lump of chalk."

Professional and Convict Witnesses.

In addition to the several types of witnesses already considered, there is an order of witness growing out of the basis of social status which the individual may occupy. These are of two kinds, namely, the professional witness and the convict. To the first division belong the public police officer, the private detective and the expert, while to the latter the guard and the criminal.

The testimony of a policeman, especially in the large cities where many arrests are made, is subject to an insidious form of defection. One is the mechanical turn which it assumes. Oft repeated formulas, however serious, will in time largely lose their mental element. Constant testifying under oath reduces the witness to an automaton performing a part rather than a conscientious person rendering a grave duty. The policeman is therefore liable to careless and conscienceless testimony. Furthermore, his vocation assumes in his mind the character of a pursuer of criminals, and he becomes intent upon conviction, dogmatic in his assertions and arrogant regarding the authority with which his statements should be accepted. He needs to be treated with a firm hand. When his ideas are crossed he will probably

show little respect for a young practitioner. He soon learns to know his man. Before a veteran he is a sample of meekness. If his promotion in office depends, and it usually does upon the showing which he makes in rounding up criminals, he will probably become addicted to the error of assuming the guilt of his captives, and his interpretation of circumstances be affected accordingly. He takes on the role of a detective, but he overlooks the fact that circumstances to the detective in finding a clue may be interpreted upon the basis of assumed guilt, while from the legal standpoint of proving him guilty, the circumstances must be treated from the basis of presumed innocence. Such an attitude makes the police detective set a certative rather than a probative value upon the facts. The attorney needs to have a care that he too is not overly impressed with this man's positiveness, certainty and insignia of authority in such matters. The policeman is manifestly not a disinterested witness.

The private detective in many respects is a duplicate of the former, but has his own peculiar failings. One of these is that his earnings are often conditioned upon conviction, and therefore unless he can find and get his man convicted he must go out of business. This situation presents such a temptation to color facts and to be colored by facts that the value of his testimony will depend almost wholly upon his character. If he be eminently successful and famous he may have character strong enough to build a career out of truth. Possibly the highest form of detective skill requires just such an ability to extract the personal element of desire and hope out of the balance in weighing facts. We have had celebrated detectives whose evidence upon the stand has been held in the highest esteem. The unknown detective, however, plans to catch a criminal, always catches him and unconsciously or consciously fights to keep him captured, not for the sake of truth, but this must be the truth for the sake of money and reputation. The lawyer will do well to

keep in mind the detective's fallacy of assuming a method of finding clues to be one of proving facts. The man hunter is not wrong in his method of search, but only wrong in assuming it to be sufficient proof. A preconceived theory may often assist in disclosing a set of facts strongly corroborative of its correctness, but easily explained upon other grounds as well. A good method of shaking such a fabric, or to test it, is to try each circumstance therewith from other standpoints of explanation. Dangerous factual combinations will often thus fall apart into the most commonplace explanations. It should always be remembered that where other things are equal that explanation which is the most simple, ordinary and natural should be and is before a jury of intelligent men the most probative of truth.

The expert witness stands in a class by himself. As social life has become more complex and vocations have multiplied, they have also become more highly specialized, so that expert witnesses have sprung up on every hand. Of course they are supposed to have one thing in common, a skilled knowledge upon the particular thing upon which they are called to testify. Now the expert witness is a particularly important man because his testimony is assumed to be of high value, it is often difficult of derivation, and is difficult material for cross-examination. First of all, the expert has a high opinion of his own knowledge, and is likely to desire to make a good public record and exhibition of his ability. Moreover he is prone to have theories of his own, or crotchets, derived as he thinks from actual experience, and so he is not infrequently prepared when he comes upon the stand to deliver an ex cathedra lecture or judgment in the most learned terms which the books afford. He feels that this accords with the dignity of a professional opinion and shows that he is up in his line. Usually he is a courteous and intelligent man who keeps well within the bounds of propriety upon the stand. Generally speaking, he is fairminded.

At the outset sight should not be lost of the fact that an expert witness may give both inexpert and expert testimony at the same sitting. Inexpert testimony relates primarily to the existence of facts, while expert testimony relates to opinions deduced from hypothetical facts. The first may be given as a foundation for the second. The physician may be asked concerning the condition in which he found a patient, and later whether in his judgment from such symptoms a person so suffering might be affected by a particular malady. The point to be watched in this connection is to be certain that the opinion is drawn from an hypothesis of fact corresponding to the facts in evidence and not from the latter themselves. It is easy for an expert to silently theorize his own set of conditions and to draw an inference therefrom, because he has probably been initiated into the lofty sounding process of answering hypothetical questions. Here the examiner is presumed to lay down such facts as are in evidence, but stating them in the form of an hypothesis or theory to the expert, who is then asked to give his opinion upon the result. All of which procedure is orderly enough, but must be critically watched at every step. For the purposes of cross-examination the lawyer too must be informed of the symptoms accompanying a given cause. Unless he be so instructed he can not weigh, much less attack the value of such an opinion. This demands a special investigation and preparation for this very question. The advocate needs more special knowledge along physiological and medical lines than perhaps any other. "The medical man becomes involved in questions of age, identity, legitimacy, life insurance, mental alienation with all of its multitudinous problems and puzzles, feigned diseases, malpractice, death, natural and violent, suicide, murder, poisons in all the infinite complexity of toxicological science, upon any or all of these grave matters the medical witness may pronounce opinions which are justly entitled to great weight."

To examine professional men trained in the technical phraseology of their own profession successfully with intelligent questions, nay, more, to critically analyze these replies for defects or imperfections requires a thorough study of many branches of learning.

In some fields, particularly that of mental unsoundness, the expert has acquired an unenviable reputation. To have experts combated by experts is to expose somewhere the vestiges of a ridiculous farce, and this is a spectacle now often occurring in our courts of law. Of course the science of medicine is no more perfect than other sciences, and especially in the fields of mental pathology there is much opportunity for differences of opinion. The advocate finds it difficult also to adapt the language of the expert to the understanding of the jury. The witness, having in his experience followed the technical path so long in his thought, is fearful of any change of terminology, and in many cases such a simplification is impossible. However, medical science is full of Latin derived words, many of which have Anglo-Saxon substitutes, and in such cases, where possible, the lawyer should always employ the simpler term. Expert testimony, however, has developed into so many degrees and forms that about all that can be said by way of general caution is to become by special preparation within the limited scope and fresher view more expert than the expert himself, and to preserve this advantage by keeping strictly within the issues at stake.³

The convict witness labors under a handicap. Society makes the sweeping inference that a conviction for any crime will, ipso facto, make the person unreliable and a perjurer. No more absurd conclusion was ever reached, and yet many well-meaning folk will act upon this curious inference. It is probable now that the lawyer will think to wipe out this witness' testimony by the use of such opportune weapon.

³ Elliott's Work of the Advocate, 265.

The man is a jailbird and what juryman would believe a jailbird under oath? The attack may be a scurrilous reviling of such a character. The unfortunate and defenseless man sits helpless through the ordeal. Having erased the man from further notice the tactless lawyer turns to other matters, but not so the jury. Sympathy for the victim of such a brutal assault burns like a slow fire and all unconsciously they have a score to settle with the attorney. In short, a jail sentence, however just, nevertheless is a distinct misfortune to a man, and the average jury is well aware of this fact. The man now has quite enough to contend with in life without having this skeleton paraded to public view for so small an end as to impair the truthfulness of his testimony. Then, too, the jury probably sees no direct connection between a jail sentence for some other offense and the act of perjury now. A criminal is not precluded from telling the truth. For all these reasons, character as proved by criminal conviction is not the safest method of impeaching evidence. Let this witness be subjected to the same tests as are other witnesses, or left severely alone, to be judged by those whose duty it is to make allowances for circumstances of witnesses.

CHAPTER IX.

ESTIMATING THE JURY.

Care in Selection.

Many practitioners maintain that the selection of a jury is the most important step toward the winning of a case. This is not a compliment to the jury system, but if it expresses the truth, it is a condition which can not be ignored by the practitioner. Logically it only goes to show that you can not get more out of a jury than it contains, and than there has been put into it, for juries are made, not found. No doubt these observations do not square exactly with the legal theory upon which the jury is founded, namely, the best method of obtaining concrete justice. Such a theory, however, overlooks that justice and duty are not the only springs to human conduct, and the jury box contains no provision for excluding other motives, and no method of punishment if they are introduced. The lawyer soon realizes that the results of his work, however faithful and correct, are likely to be jeopardized by the human nature of the jury. In this he confronts a situation and not a theory, and so he seems justified to argue that if he and his client's interests are to be determined by a human nature that often silently, if not overtly, substitutes mercy in place of justice, common sense in place of court instructions, personal convenience in place of due deliberation and practical expediency in place of law enforcement, therefore, in self-defense, he is entitled to take a hand in the selection of a jury. The law itself has recognized the negative side of this right by providing the system of challenges through which objectionable individuals may be excluded, and it is through this instrumentality that the lawyer extends the art of selection to a positive search for favorable material. Outside of peremp-

tory challenges such manipulations, however, are subject to the countercheck of the opposite counsel and to the discretion of the court. One would suppose that the power of counsel would thus be extremely limited, but it is only necessary to read the history of cases where it has taken weeks of time and hundreds of talesmen have been examined before a jury has been found, to indicate how important and how exhaustive is this feature of trial work.

The proper estimation of a jury is therefore the *sine qua non* to the correct valuation of all the evidence in the case, as well as the efficient arrangement of the same in argument. The case must be won through the eyes of the jury. As they will see it, is the point of view from which the successful advocate must plan and execute his campaign. He must accurately size up his jury in order to organize his effort, even though he takes no part in shaping its personnel. Now the estimation of a jury involves the taking into account both psychological and sociological elements. It is an institution having both an individual and a group side. But there is one fact which the lawyer must always recognize—a jury is not the same as the sum of its individuals. You can not locate the will of a jury by counting a majority of individuals, even though the verdict is arrived at by a vote. The will of the jury is more likely to reside in some one member. This results from the fact that the thing in terms of which the verdict is always rendered is not in personal feelings, ideas or argument or law, but in willpower somewhere which exerts control or will not yield to persuasion. It only requires one will, however unintelligent, and whatever the motive be, to hang a jury in a criminal case, and if perchance this will should be intelligent it may only require that it hold firm to eventually absorb all of the others, or to reduce them to nonresisting subscribing machines. Two things, therefore, in connection with a jury demand careful measure-

ment. First, the separation of its members into leaders and followers, and, secondly, the isolation of the dominant leader.

Where the individuals are each personally known to the lawyer, he has little difficulty perhaps in picking out the "forceful man", or by general reputation the disposition of the man may have been learned. When no such acquaintance exists, a quick judgment of character must be made during the preliminary examination or during the trial. There are no uniform signs of character among men, but a few symptoms are at least worthy of observation. The drowsy and sleepy juror will necessarily be compelled and happy to follow where others lead. He is too apathetic to be obstinate. The juror, on the other hand, who leans forward to catch every word is usually a person more interested in the incidents of the trial than in the principles involved, and hence not so determined as to what should be done. The juryman who behaves more like a spectator visiting in the jury box than a man with a serious duty to perform, has probably concluded in advance as to how the issues will eventuate, and does not care to have his view weakened by listening too attentively to the evidence. Again, the individual who strokes his face or beard or rearranges his clothing every few moments while narrowly watching the proceedings is either about to shift a preconceived conclusion in his mind or has already settled the matter several times, first one way and then the other. The forceful man is usually somewhat quiet in attitude, does not fix his eyes at all times upon the witness, for his mind is constantly reverting from the external point of attention to a subjective weighing of values, hence he betrays no signs of absorbed solicitous interest, nor seems at all amused at the incident which causes general levity. He may appear to the casual observer to be a trifle indifferent and stolid, but when the jury has retired then the lion will come out of his lair, shake his mane and say that two and two make four, and that is all that there

is to the case. He is the man whom the attorney fears and bends his efforts to impress.

Having anticipated the group organization which will take place in the jury room from the individual proclivities to lead or to follow, the next step is to estimate the various forms of bias which will exert their influence in preventing a coalescence of minds around a desired verdict. These may be enumerated as follows: bases of religion, nationality, politics, locality, class, custom and education. To measure the effect of these successfully calls for more or less detailed information concerning such jurymen. However difficult and wearisome such a requirement, yet to be beaten before the trial begins from the lack of preventive measures, spells defeat just as disastrous to reputation as though it had come in some other form.

The Religious Bias.

The religious bias, though not the most general, is one of the strongest because it carries with it its own apparent justification. To do a thing for religious reasons alone has been the dangerous doctrine that gave the sword of conquest to the Mohammedans. Because in the name of the Lord therefore, of the Lord is, in its milder forms, a subtle fallacy, and a hideous blasphemy in its more rancorous expression. Not all people have divorced themselves entirely from the practice of sacrificing justice for the sake of a religious organization. The client, or the prisoner, or the counsel, belongs to a certain church, and the jurymen is an ardent exponent of the same faith, hence what better opportunity of exercising the Christian virtue of loyalty than to deal gently with the unfortunate man, not precisely for church reasons, but because a man's friends ought to stand together, other things being equal and this conclusion arrived at, it follows that other things are equal—so goes the self-justification. The

motive of such a jurymen is not bad in itself, rather distinctly noble, but he is forgetting that his duty to the State is in this case commanded of him and that it is paramount. It is the State's duty to exercise clemency, if the ends of justice be thereby the better served, and not the prerogative of this individual, yet now and then a man may be found who believes that personal duty in the courtroom, as elsewhere, demands a breaking of the law of the land in some cases, and that he is the sole and final judge of the occasion. The religious bias, however, may be nothing of a more active nature than a shrinking from the exercise of severe justice. It is hard sometimes to deliver the whirlwind when the sowing to the wind is a thing of the past. So the sensitive person will unconsciously lean to the side of leniency. This attitude arises because the values already destroyed by the defendant do not now weigh at their true worth, and hence it becomes necessary for the advocate to revivify and refresh the past. Even then there is something so terribly warm and living about the present that the past by its side looks a pale mist. Of course the person who has scruples against enforcing capital punishment, in those jurisdictions where it is the law, will be disqualified entirely.

Of all the biases of human nature, none are more intense when present than is the religious bias. Sometimes it assumes a species of fanaticism, and no appeal is more difficult to make effective than one to counteract such a trend of mind. If in some manner the advocate's cause may be adroitly substituted for that of the opponents in its claim upon the jurymen's attitude, apparent loss may sometimes be turned into a positive asset. One thing is certain, nothing short of the most profound respect for religion, reverence towards God and the Bible and consideration for personal beliefs will enable a lawyer to cope successfully with jurymen of this type. And as a rule the same attitude meets the general approval of men in all classes of society.

The Nationality Bias.

This feeling is so strong in a few people as almost to amount to a religion. However, as is natural, it is more common among people who have been transplanted from a foreign country and have not yet been fully assimilated into the national spirit. Popular expression has termed this form of bias, clannishness. Certain sections of the United States exhibit this bias in much stronger form than others. This depends upon the flow of immigration. And this bias on the part of peoples for their own kind, after becoming established, generates a counterfeeling and prejudice in some places against the foreigner. As a result the bias sometimes takes on a strong preference for one's own nationality, and at other times a dislike for some other nationality. The so-called race prejudice is an example of such bias. This factor needs to be carefully taken into consideration in the composition of the jury. It is quite likely, if more than one nationality of a pronounced type be represented, that it will affect the question of harmony in the jury. Not only will a difference in nationality sometimes affect the attitude of impartiality which should exist between the jury, clients and lawyers, but also breed antagonism in the jury room. Whenever possible, people having a pronounced sympathy for their own kind should never be yoked together upon a jury, and much more so if they possess prejudices against each other. As a matter of course the counsel will promptly remove any man with a particular antipathy against a race of which his client or himself is a member, even though he think he can render a fair and impartial verdict. A man who condemns a race, as a race, will not consider that it has any rights which he is bound to respect on an equality with other peoples.

The Political Bias.

Almost every juror must be calculated to embody some political set. He may boast of his freedom from the party leash, but if he is a man of any standing in the community he will at least have some traditional political experiences which will color his views. Convictions along political lines are generally expected of a good citizen, and the feeling and preference for one party or another is expressed so freely and often that this bias never need apologize for its presence. As a consequence, under some circumstances and conditions, the lawyer should not overlook this factor in the composition of a jury. And especially should the relation of the case to any particular doctrine or measure be noted. Next to religion, and in some instances more than religion, the political past or principle or measure is the most sensitive part of many men's organisms. One thrust or reference to the subject and the man is in an unforgetting and unforgiving heat of passion. Particularly any questions touching on issues of the Civil War, from a partizan standpoint, was at one time the most inflammable of material. That period is all but gone, yet the time will never come when the inveterate passions will not be associated intimately with political issues. The possession of radicalism upon political questions does not, however, argue that the man will not make an impartial juror in other matters in no way related to politics. Oftentimes such a man is very intelligent and broad-minded and in full control of himself except, alas, upon the one question of politics. The presence of such a mind upon the jury makes it necessary for the advocate to guard his own language and that of his witnesses very judiciously, in order not to fan the smouldering fire. Not infrequently this danger is subtly concealed in the name of some public man. The juror, all unbeknown to the lawyer, is a hero worshipper. The name of Jackson, Douglass, Lincoln, Grant or any

other of fifty names may be the one at whose shrine he has worshipped for years. A compliment to the name in passing will quicken this juryman's pulse, while a criticism of his character or policy will at once damn the offender beyond recall. Or it may be that a juryman long ago buried a part of himself with some dead issue. Populism, free coinage of silver, antimasonic agitation, etc., etc., constitute a graveyard, among whose tombstones the unwary lawyer had better not wander in the courtroom. Such references are so uncertain in effect and so dangerous at times that the wise advocate will studiously avoid them.

The Provincial Bias.

Provincialism manifests itself as a feeling of partiality for one's own particular locality. This area may be very restricted to the immediate neighborhood or extended to include an entire state. When it is comprehensive enough to embrace the entire country in which one lives it is graced with the more euphonious name of patriotism. Few cases at law involve the feeling of patriotism as a bias, hence let us limit our view to the narrower form. Pride in one's home town or city prompting the practice of trading at home rather than abroad, and of emulation between cities and districts is common. The feeling of locality versus the world is highly developed in some remote districts and often assumes a bitter attitude in mountainous countries. The law recognizes one phase of this feeling when it provides for a change of venue. Let a shocking offense be committed in a community and the fair name and reputation of the place is at once perceived to be outraged. The result is that no jury of men can be found in the locality who look upon it with the same cool impartiality with which other communities view the affair. Less often too the feeling will take on a defensive turn and an inclination to condone and cover up

the crime will follow. The bias will sometimes become very deep seated in particular persons who frequently make no justification except that "a man ought to stand by his friends, right or wrong", or the vaguely expressed universalized spirit that "when you touch my community you touch me"—a sort of social esteem. A jurymen of this type carries the bias with him under the form of one of these vaguely defined principles. Again, the feeling will spring up suddenly and generally among the people of a community in response to the stimulus of some event. In these cases the best plan is to defer action until the fever subsides. The lawyer should recognize in this form of bias a very primitive and tenacious feeling, furnishing a strong motive to action in many circumstances. Many persons, especially of the more ignorant classes, will respond fervently to an appeal of this kind. The blood of consanguinity is but little more binding than the blood of familiarity. However, the practitioner finds it exceedingly difficult to discover in advance the presence of the individual kind. This man may never boast nor speak of the matter, but when tested will stand like a rock upon the instinct. Moreover when uncertain and with the two sides in the balance, when possible, this factor will often be allowed to decide the issue. Whenever the feeling of instinct partakes of a general social nature then the lawyer finds his course of action more clearly marked out. Time is the abating remedy.

The Class Bias.

Class bias and nationality bias are somewhat similar, but the former is more limited in its scope. It is a feeling based upon similarity of circumstances and rank rather than of origin and descent. The one is hereditary and natural, the other acquired and artificial. Class bias is generally increased by isolation of the classes in close proximity where friction

ensues between them. Capital and labor furnish a well known example, official and nonofficial classes another. This form of bias is likely to assume a combination of bitterness and disgust. Each class believes that it is in the right, and is in reality the superior of the other. This bias usually develops only through contrast and friction. For this reason it is characterized by more or less of a social warfare. Naturally the advocate should endeavor to prevent any antithesis between members of a jury through being brought into juxtaposition at a trial. An individual, or the interests of a client, should be tried by people of his own class or of at least a neutral class. Such a problem is more common in the vicinity where great contrasts in the conditions of men exist side by side. It is seldom a matter of consideration in smaller towns and communities.

The Custom Bias.

Custom has been defined as a social habit, and the ease and certainty with which a habit will follow its beaten track is well known to every man. Moreover habit has a feeling tone of positive satisfaction and custom affords the same gratification. With what force of gravity and feeling of harmony and fitness the ordinary man and woman obeys the dictates of fashion! Where the custom persists for a long time it works its way into the affections of the follower, it becomes part and parcel of his mode of existence to the exclusion perhaps of better things. Nevertheless it becomes entrenched in a feeling of preference and unwillingness to surrender. All people are dominated by this natural and in many ways necessary bias. It keeps society in place, steadies social movement and relieves uncertainty. But now and then it gets athwart of justice and becomes an obstacle to progress.

The bias of custom, however, seldom contains any acrimony or passion. It is a mild, seductive, persuasive feeling,

and for this reason exceedingly potent as a spring to action. "We have always done it in that way, and why not now?" and "it is good enough for me" are favorite ways of expressing its power. Since this bias is so uniform among men and social customs are generally known, the lawyer is fully apprised of what to expect, but a jurymen may have some private custom of his own to which he is especially partial. It is one of his methods of doing things of which he is especially proud. How natural for him to approve from the jury box the man of similar practices, and to sympathize with his point of view should it chance to be raised during the trial. Thus it follows that people of similar vocations are likely to have much custom in common, and especially if of the same vocation, hence it behooves the attorney to watch for jurymen who take a special pride in methods of life, for they are almost certain to be riveted to the bias of a custom. Different localities sometimes have their own peculiar customs as to different social sects and nationalities. Those pertaining to religious doctrines, or special holidays, or marriage occasions, or formal obsequies should be well understood by the lawyer whose client or whose jury are devotees thereto. Customs invoke feelings which are very intense, though seldom or never virulent. Although unostentatious they account for many a verdict otherwise inexplicable.

The Bias of Education.

Here is a deflection of the judgment caused by the simple fact that a man believes the most in that which he understands and appreciates. No man can know more than a modicum of what is to be known, and in these days of high specialization, people are encouraged to become educated along one line to the practical exclusion of other equally important branches. Soon, however, the individual so trained will begin to think and feel mostly in connection with his

own profession, and in time he loses his sense of general perspective to such a degree that he overemphasizes his own field and underestimates the importance of others. This is the man who, when found in the jury box, will inevitably attempt to apply the rules and principles of his own business to that of the situation before him. The lawyer as a witness will see everything through the eyes of the law, the social reformer everything from the standpoint of social betterment, the minister everything from the standpoint of Christian teaching, the medical man everything from the standpoint of physiological conditions. Such a result is merely the logical outcome of intensified but limited experience. Each is faithful and often accurate to the standards under which his life is cast. This species of bias, however, usually yield to reasonable argument and compromise and is therefore not so pernicious as other forms.

The Best Jury.

The best jury of course is an intelligent, impartial, unbiased one. This is more nearly realized when it is composed of men accustomed to having extensive dealings with other men of equal rank. A boss, especially one who does not himself labor with his men, is likely to assert or attempt to assert in the jury room his habit of unquestioned authority. A man who prefers to live alone as much as possible, and who does not mingle freely with his fellow man, will not make a good juror. He can not upon this occasion because he does not in his daily life appreciate the value of society and its rights, nor of an individual as a member of society. Again, a juror should be a man carrying responsibilities, so that he has a due sense of obligation; he should be a family man, for this type of a man will weigh the effect of a verdict upon his own children and their future interests, in short, he has the welfare of society in his mind's

eye. Again, a juror should have some regard in his practical life for religion. He may not be a churchman, but he should cherish ethical ideas. This will tend to make him more conscientious in the fulfilment of his duty and more responsive to an oath. In addition to these things he should be a man of good habits so that justification to himself of his own crooked path will not prompt him to look with unmerited leniency upon a man guilty of a similar offense. For this reason men engaged in some business under the disapproval of society make notoriously bad jurymen when the question in any way is an issue connected with such business.

Moreover, the men upon the jury should not only be generally respectable in every way, but be intelligent representative citizens, who have a reputation for honor and fairness which they feel bound to sustain. A set of twelve such men uniform in social rank and age make the best possible jury. An ignorant man, however honest, is frequently unable to weigh issues, to understand the instructions of the court and to comprehend that a jurymen although in a sense free from punishment is bound in his action strictly within the evidence and the law as propounded by the court.

CHAPTER X.

ARGUMENT BEFORE THE JURY.

The Right of Argument.

The ancient right to appear in the courtroom and be represented by counsel has not been construed to be identical with the right to be heard in argument. The former is undoubtedly an absolute right in all kinds of cases and beyond the power of the court to deprive a party, but the latter is only a conditional right and does not exist at all unless within the discretion of the court there is something debatable to argue. The following observations need to be taken into account with these statements: The "true purpose of counsel is to furnish an aid and help to the court and jury in the administration of justice", and consequently the court may dispose of the service in civil cases when unnecessary, and the exercise of this discretion is not error, nor will a judgment be reversed in order that an advocate may make a speech. So, also, in a criminal case the court when assured of its position upon a given point of law may refuse to hear argument thereon, which it knows would be unavailing. Upon questions of fact in a criminal case, the reverse is true, for it has been held that the cause of justice would be materially injured were a court merely upon its opinion of the value or clearness of the evidence be allowed to exclude the argument of counsel. Thus, said Scott, J., "if there be any point involved in the issue before the jury, on which their minds may be enlightened or their consciences satisfied by argument, the accused has an undoubted right to all the advantage that may be derived from that source, and the right would be utterly destroyed if it were

allowed to the court to prohibit argument, merely because, in its opinion, the evidence is so clear that argument can not vary it."¹

Limitations Upon the Right.

(1) NUMBER OF SPEAKERS AND SPEECHES.

It has been held that the constitutional right of being heard by counsel does not imply the right to demand a hearing for more than one counsel. When a number of plaintiffs are voluntarily joined together their interests are said to be collective, and thus collectively represented as one plaintiff, but in case of a number of defendants compulsorily united and having diverse interests, each party, not represented by the counsel of others, may claim the right to be heard on his own behalf by at least one counsel. To prevent the abuse of this right, such party may be required to show clearly to the satisfaction of the court the justice of his request. In the case of the *United States v. Mingo*,² Mr. Justice Curtis, of the Supreme Court of the United States, ruled that the junior counsel, in a capital case, has a right to argue the law and the facts, but that only one counsel has the right to close. Some of the states have statutes bearing upon the question. A Texas statute providing that in felony cases the argument shall never be restricted to less than two speeches on a side was interpreted not to confer the benefit of two speeches when there was but one counsel.³

(2) RESTRICTIONS OF TIME.

The power and right of the court to exercise a sound discretion in the limitation of time consumed in argument, both

¹ *Word v. Commonwealth*, 3 Leigh (Va.) 743. See also *Peagler v. State*, 110 Ala. 11, 20 So. 363.

² Fed. Cas. No. 15781, 2 Curt. C. C. 1.

³ *Morales v. State*, 1 Tex. App. 494, 28 Am. Rep. 419.

in civil and criminal actions, is well established. Nor will such exercise be revised upon error except in case of manifest abuse. The prerogative extends even to cases of capital punishment, with the caution that such a limitation be imposed only under very unusual and extraordinary circumstances. It is the usual custom for the court to inquire of counsel how much time they desire, and to come to a mutual understanding of the limit to be set in advance. This is particularly true in connection with the closing speech in civil cases. To bring the abuse of this discretion properly before the courts for review, it has been held that the presentation of affidavits is not sufficient, but that the ruling must be promptly objected to at the time and an exception taken, and there is some authority for the view that the "counsel must ask for further time" or in some manner indicate to the judge that injustice is being done.⁴

An interesting account of the origin of the practice of limiting time is found in the case of *State v. Page*.⁵ Said Ryland, J., "This matter of limiting the time to be occupied, in the prosecution of causes before courts of justice is of very ancient origin. It is found among the Greeks, and was carried thence to Rome. The Greeks had their instruments by which they measured time in the halls of judicature. The clepsydra was used. It was an instrument by which they measured time by means of the flowing of water through it; and so frequent and common was the practice of limiting the time to the speakers by water flowing through these instruments that the word 'water' was used metaphorically for time. When a speaker was allowed to speak so long, they said he was allowed so much water. The Greeks had an officer in their courts of justice whose duty it was to watch this measuring of time, and when a certain amount was al-

⁴ *Williams v. Commonwealth*, 82 Ky. 640; *Kizer v. State*, 12 Lea (Tenn.) 564. Compare *Sewell v. Commonwealth*, 3 Ky. L. 86.

⁵ 21 Mo. 257-259, 64 Am. Dec. 229.

lotted to a speaker, if there were any documents to be read during his speech, the time the reading of such documents consumed was not to be estimated as any part of what had been allotted to him; therefore this officer, whose station was near the clepsydra, stopped the water while the documents were being read. The orator did not waste his water in reading documents. Pliny tells us that he was allowed ten large amphorae of water once, and so important was the cause in which he was engaged that the judges added four more to the amount. He says he spoke five hours. He tells us likewise that he himself used to allow the accused as much water as he wanted. The tribune of the people, Titus Sabinus, only allowed half an hour to Cicero to speak in defense of Caius Rabirius when he was prosecuted for murder. This, too, on an appeal from the judgment of the Duumviri to the people. The orator complained of being cramped by the narrow space of time; for though it would be nearly enough to make the defense for his client, it would not be enough for preferring the complaints he had a right to bring forward. 'I have spoken the time allowed to me', he said, when about to conclude; and in no part of the monument erected by his genius to his own immortality will you find a more polished or more brilliant gem than this half hour's work."

(3) EXAMPLES OF PROPER USE AND ABUSE.

Five minutes on each side was upheld as sufficient in a case in Tennessee, in which the Supreme Court said that had the interests been larger it would have been a ground for reversal.⁶ Limitation of counsel to ten minutes on either side, in an action against a railroad company for damages in the killing of live stock where the defendants intro-

⁶ *Burson v. Mahoney*, 6 Baxt. (Tenn.) 304.

duced no evidence, was held not an abuse of discretion.⁷ Fifteen minutes was upheld in the state of Missouri in a criminal prosecution for cutting timbers upon school land.⁸ A restriction to half an hour was sustained by the Court of Appeals of New York in a case of conviction for an assault with intent to kill, but few witnesses had been sworn, the questions of fact were not many and all evidence had been taken the same day.⁹ Ninety minutes time, in a civil case in Indiana, when the defendants refused to make any argument, was held upon complaint to have been ample.¹⁰ Two hours and one-half on each side was judged proper by the Supreme Court of Nebraska in a murder trial, where the time had been extended to three hours.¹¹ After thorough consideration the Supreme Court of Ohio, in a criminal case where two adjournments had occurred, decided that five hours on a side with twenty minutes addition to the defendant without interruption, was within the bounds of discretion.¹² In a capital case, where there were three counsel on the defense and the time was limited to one hour and ten minutes on a side, the reviewing court while not pronouncing it a case for reversion, nevertheless intimated that the time had been unusually restricted.¹³

On the other hand, the following have been held to have been an abuse of discretion: a limitation of counsel to five minutes on either side under an indictment for larceny, where nine witnesses had been examined;¹⁴ thirty minutes only, in a trial for burglary and larceny, when eleven witnesses had been examined consuming half a day, consisting of circumstantial evidence and disclosing serious contradic-

⁷ *Trice v. Hannibal, &c., R. Co.*, 35 Mo. 416.

⁸ *State v. Page*, 21 Mo. 257, 64 Am. Dec. 229.

⁹ *People v. Kelly*, 94 N. Y. 527, 2 N. Y. Cr. 15.

¹⁰ *Rosser v. McColly*, 9 Ind. 587.

¹¹ *Hart v. State*, 14 Nebr. 572, 16 N. W. 905.

¹² *Weaver v. State*, 24 Ohio St. 584.

¹³ *Kizer v. State*, 12 Lea (Tenn.) 564.

¹⁴ *White v. People*, 90 Ill. 117, 32 Am. Rep. 12.

tions;¹⁵ and again, in a Georgia case, in a trial for assault with intent to kill, when the evidence concerning the stabbing being in self-defense was conflicting, a limitation to thirty minutes, against the protest of counsel, extended to forty, was judged by the Supreme Court to be grave error and in contravention of the rights contemplated by the constitution.¹⁶

The Order of Argument.

(1) RIGHT TO OPEN AND CLOSE.

The right of argument belongs equally to both sides, and hence the question of the order in which the two sides shall present their discussion becomes highly important. So important, in fact, that a learned judge and writer has made it the subject of a distinct treatise. It is held that the right to begin carries with it the right to close and this logical connection is based upon the fact that he who begins the argument does so because upon him is cast the burden of proof. A denial of the right to open and close the argument, according to the leading case of *Mercer v. Whall*,¹⁷ which the American courts have generally followed, to the "party entitled to it and claiming it at the proper time, is error for which a new trial will be granted; unless the court can see, clearly, that no injury or injustice resulted from the erroneous decision". Nor will the refusal of the right to open be cured by granting the right to conclude.

In the case of *Penhryn Slate Co. v. Meyer*,¹⁸ although the case had already been tried three times, the judgment was reversed for this error alone, in which the court said: "The opening the case to the jury, by the plaintiff, and the laying

¹⁵ *Dille v. State*, 34 Ohio St. 617, 32 Am. Rep. 395.

¹⁶ *Hunt v. State*, 49 Ga. 255, 15 Am. Rep. 677. See also note in 27 Am. Rep. 413.

¹⁷ 5 Ad. & El. (N. S.) 447.

¹⁸ 8 Daly (N. Y.) 61.

before them of their evidence in the first instance, and confining the defendant to evidence in the way of reply, was a part of their legal right, of which they were deprived under exception, and I fail to see how the error is cured by allowing them afterwards what was their further right, the final address to the jury."

(2) FAILURE TO EXERCISE RIGHTS.

There can be no question that either side has the right to waive his right of argument, but the right of the party who waives the opening speech to thereafter make a closing speech has been disputed. However, the better holding is that it would be imperiling the cause of truth to have arguments presented without the privilege of reply to them by the opposition, and hence where no beginning speech has laid out grounds of discussion the reply must be confined to issues and matter raised by the opponent's address.¹⁹ On the other hand, a waiver of the second party of his right of reply in a civil case, should preclude the plaintiff from making any further argument to the jury. There is nothing to answer.²⁰

To Which Party Belongs the Right.

It has been apparently impossible to lay down a rule which would determine in all cases to which party in the legal controversy belongs the right to open and close the argument. A satisfying principle may be deduced to govern all of those usual cases, where the parties may be easily designated as plaintiff and defendant, but no such governing test has been discovered which will cover the unusual, special cases, which vary from the ordinary type of action, and the

¹⁹ *Citizens Street R. Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 316; *Conrad v. Cleveland, &c., R. Co.*, 34 Ind. App. 133, 72 N. E. 489.

²⁰ *Tyre v. Morris*, 5 Harr. (Del.) 3.

result is a great confusion and contrariety of opinion among decisions.

A number of confused ideas upon the subject, originating in England, were transplanted to American soil, and still cause considerable trouble. Whatever order has gradually emerged came out of the following entanglements. The first effort to formulate a logical rule did not fail because it proved to be illogical, but because it did not distinguish between two facts not at that time clearly discriminated, and which made the rule uncertain. This rule, to wit, that to the party sustaining the burden of proof inhered the right to open and close the argument, was based upon a true conception of the right, that he who must prove something in order to win should be entitled to begin and conclude the argument in view of having a positive affirmative task to perform. The failure of the rule came in not pointing out which party had the burden of proof. In short, the difference between what is merely a burden of procedure, necessary to keep the burden of proof under its proper party until a failure or success in establishing the proof is concluded, and the burden of proof itself, was overlooked. Now the burden of proof in the primary sense is essentially on one or the other party from the beginning and can not shift. Since also the opposite party must either keep the issue from being proved, or allow his opponent to win, he too must assume at the start a reverse burden of procedure to keep the primary burden from being satisfied by evidence or argument at any stage of the trial. Since now both parties proceed by introducing evidence, it was natural to confuse and erroneously identify the two.

Moreover, the application of this rule brought another perplexing fact. The burden of proof was judged to reside in the party who must from the start prove something in order to win. But upon this theory there might result two burdens of proof in the primary sense; one belonging to the

plaintiff and the other to the defendant, for in some cases new matter is alleged and denied from both sides. This would frequently assume the form of a merely formal burden upon the plaintiff, and a substantial burden upon the defendant. For example, the plaintiff being the party seeking to move the court, unless a judgment is had upon the pleadings must always have a burden of proof, however slight and formal, for having made an allegation of fact against the existing order of things, he must prove it, that is, he must introduce evidence enough at least to make a *prima facie* case before he can be entitled to judgment. This may amount to no more than the introduction of a paper and the identification of a signature. Following this, the defendant may introduce some substantial issue in defense, upon the decision of which the whole case will be determined. Now the question is, as to which of these, the insignificant though first in order, or the substantial though second issue, deserves to be ranked as the burden of proof in conferring the right to open and close. The rule did not settle this practical difficulty.

Some of the states, however, sought to remove the burden of proof and the right attached thereto from the bondage of mere formality by remodeling the rule to read, "the right rests with the party having the burden of the issues". But this too fell into confusion, for it did not take into account that in some cases the issues were divided between the plaintiff and defendant. The Indiana and Iowa statutes having proved unsatisfactory, still other states varied the rule to be "that the right rests with the party having the affirmative of the issue", but once more uncertainty lurked in the application, for even admitting that the trial judge on an inspection of the pleadings²¹ might determine which was the affirmative of the issue, yet should he decide from the form of the issue,

²¹ *Richards v. Nixon*, 20 Pa. St. 19, 23; *Dahlman v. Hammel*, 45 Wis. 466.

as held in Texas,²² or by the substance of them as held in Kentucky,²³ New Hampshire²⁴ and New York.²⁵

A partial solution of the difficulty was reached in the year 1845, through a new rule laid down, in a decision rendered in the court of the Queen's Bench, which settled previous conflicts and established a reliable test in all ordinary actions between plaintiff and defendant. This principle, which is as follows, has been generally adopted in this country: "Where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him."²⁶ The test is as to which party upon the state of the pleadings and record admissions without evidence being offered by either, would get a verdict for substantial damages. If the plaintiff under such conditions would succeed, then the defendant begins and closes, but if the defendant, then the plaintiff has the right.²⁷

The effect of this rule is to fix the burden of proof, and hence to give the right to open and close to the plaintiff in every case where he has anything to prove in order to get a verdict for substantial damages, to recognize that the right to open and close remains upon the party upon whom it primarily rests, to impose the right to open and close upon the plaintiff when the issues are divided between the parties, and also upon the plaintiff in every case where the general issue or a denial is pleaded by the defendant in answer.

The above doctrine having its origin in the case of *Mercer v. Whall* is restated in this country by Judge E. Darwin Smith, in a learned opinion in the case of *Huntington v.*

²² *Latham v. Selkirk*, 11 Tex. 314, 322.

²³ *Daviess v. Arbuckle*, 1 Dana (Ky.) 525.

²⁴ *Chesley v. Chesley*, 37 N. H. 229, 237.

²⁵ *Huntington v. Conkey*, 33 Barb. (N. Y.) 218, 228.

²⁶ *Mercer v. Whale*, 5 Ad. & El. (N. S.) 447.

²⁷ *Camp v. Brown*, 48 Ind. 575; *Veiths v. Hagge*, 8 Iowa 163; *Huckman v. Fernie*, 2 Jur. 444.

Conkey.²⁸ (1) "The plaintiff in all cases where the damages are unliquidated, has the right to open the case to the jury and of the reply. (2) Whenever the plaintiff has anything to prove, on the question of damages or otherwise, he has the right to begin. (3) In other cases where the damages are liquidated or depend on mere calculation—as the casting of interest—the party holding the affirmative of the issue has the right to begin. (4) The affirmative of the issue in such cases means the affirmative in substance, and not in form, and upon the whole record. (5) The denial of the right to begin, to the party entitled to it and claiming it at the proper time, is error, for which a new trial will be granted, unless the court can see clearly that no injury or injustice resulted from the erroneous decision."

The determination of the right to open and close the argument, as already mentioned, when it comes to special cases, has not been reduced to any uniform practice. The following formula were it followed out generally might be of assistance, to wit: "That the right belongs to the party who seeks to alter the existing state of things", for example, who runs counter to an existing presumption; and if there be a presumption on either side, then to that party who first resists a presumption. Thus in criminal cases the prosecution always attacks the presumption of innocence, although this may be defended by a plea of insanity in antagonism to the presumption of sanity.

The special action arising in contesting the probating of a will on the ground of insanity of the testator, affords an excellent example of contrariety of opinion by the courts. The original action, being merely a peaceable petition asking for a decree of the court admitting the will to probate, can not be said to run counter to a presumption, but rather to prove the presumption of capacity in the testator and the regularity of the document, although it might be construed

²⁸ 33 Barb. (N. Y.) 218.

liberally to be an effort to alter the existing state of things. The opposition, however, takes a radical stand against the presumption of sanity. Different jurisdictions have taken different views as to who, in this case, has the burden of proof. Some grounds for a justification of both views is to be found in the fact that more than one kind of an action is possible in this kind of a case, resulting in an exchange of plaintiffs and defendants. Thus there may be opposition by the defendants to the original action asking for a decree of the court, or the decree having been rendered, there may be an appeal to have the decree opened up and set aside. The latter would be a new action and the parties who would be defendants in the former action would become plaintiffs in the latter. Or in the first form of action the opponents might ask for a trial *de novo* in the higher court, in which instance the order of the parties would remain the same, or a review of the case might be sought, in which case the defendants would become the appellants, or moving party. These facts should be carefully noted in comparing the diverse holdings found in connection with this class of cases.

Other special actions, such as replevin, interpleader, fraud, proceedings on reports of commissioners, auditors and referees, condemnatory proceedings, petitioner, claimants and administrators and still other miscellaneous cases, have been dealt with in various ways in different jurisdictions, and the statutes of the particular state must be consulted upon this proposition.

Since the question of the burden of proof has been raised in connection with the problem of the right to open and close the argument, it is well to add a further observation or two. It not infrequently occurs that one party will admit in his pleadings the allegations made against him, or having formally denied them, will nevertheless introduce no evidence in support of the same. In such circumstances what is the effect upon the burden of proof? The first may be answered

by noting that pleadings which respectively allege and admit, without other matter in defense, give no occasion for argument of any kind, unless it be to ascertain the amount of damages. In the latter case the plaintiff retains the burden of proof. The second situation illustrates a case in which the form and substance of the issue conflict. An opinion in a New Hampshire case takes the ground that the admission does not remove the burden of proof from the plaintiff, but that the admission is a form of evidence to be credited to the plaintiff. This somewhat unique position is stated by Bell, J.: "The right depends on the form of the pleadings, and is determined by the fact that the affirmative of one of the issues is upon the plaintiff; and this is in no way affected by the circumstance that the plaintiff has greater or less facilities for making the required proof. Any material fact may be proved by the admissions of the adverse party; and it does not change the burden of proof upon the pleadings that the defendant has admitted the claim which he formally denies by his plea. Nor is it in any way material in what form the admission is made, so long as he chooses to deny it upon the record and join issue upon it."²⁹ In both Texas³⁰ and South Carolina³¹ the opposite view was taken, but it was necessary that the admissions be made upon the record of the cause of action, except in so far as it may be defeated by defenses brought out in the trial. However, the admission by the defendant of a part of the plaintiff's case, or a part only of the evidence, will not place the burden of proof upon the defendant, nor will the mere failure of the defendant to offer any evidence even when having alleged an affirmative defense impose upon himself the burden of proof.³² The state of Massachusetts perhaps adopted the

²⁹ Buzzell v. Snell, 25 N. H. 474.

³⁰ Ney v. Rothe, 61 Tex. 374; Halzell v. Neal, 23 Tex. Civ. App. 26, 56 S. W. 137.

³¹ Thompson v. Security, &c., Ins. Co., 63 S. Car. 290, 41 S. E. 464; Burckhalter v. Cowerd, 16 S. Car. 435, 441.

³² Doe v. Bray, Mood. & M. 166.

most extreme rule of uniformity by giving the plaintiff the burden of proof in all cases with its attendant right to open and close.³³

Restrictions as to Method and Content.

(1) AS TO METHOD.

First of all, the law requires compliance in all of the speeches with three fundamental rules, to wit: First, that the discussions be limited to the issues defined and laid down in the pleadings. To permit a wandering from these premises would lead to a hopeless confusion of what principles have actually been settled by the litigation. As a matter of record for future use by the principle of *res judicata*, it is essential that the issues in the pleadings and those in the trial coincide, if for no other purpose. Secondly, the discussions must not transcend the bounds of the evidence which can actually be produced, otherwise a very elaborate argument might be constructed upon purely imaginary grounds. The question must be settled from actual testimony, and not upon what counsel hopes he may produce, or assumes to have been produced. Thirdly, the discussion must keep within the confines, not only of testimony which can be given, but such testimony as will be permitted within the rules of evidence to be invoked. Much matter that is material in a logical way to the issues may be totally irrelevant in the eye of the law, and an advocate has no right to base predictions or argument upon such facts.

Again, there is a broad distinction made between points of fact and points of law. One of the fundamental marks of our system of law is the separation of these two kinds of material and the referring of the one for settlement to the

³³ *Spaulding v. Hood*, 8 Cush. (Mass.) 603n; Page v. Osgood, 2 Gray (Mass.) 260.

court and the other to the jury. According to this demarcation the field of argument before the jury is limited exclusively to questions of fact. And such limitation is widely recognized and enforced, but the practice is not uniform, because it is not always possible to raise issues which are purely of law or of fact. Many questions are constituted of mixed law and fact which elements can not be separately determined. This twilight zone has, therefore, necessarily raised the question as to what extent counsel may argue matters of law before the jury. An adequate answer to this query must take into consideration a difference between civil and criminal actions, and a difference in the procedure of giving instructions to the jury before or after the arguments of counsel.

In connection with civil cases the law seems to be well established that the jury must receive the law from the court and not from the counsel, and, consequently, that counsel have no right to argue questions of law to that body, nor to read arguments upon points of law from authorities, even where the purpose is merely one of illustration. Some doubt as to the applicability of this rule in cases of libel and slander are on record, and the state of Georgia under some peculiar constitutional provision, upheld the right to argue the law as well as the facts to the jury in civil cases, subject to the corrective power of the court in charging the jury and in granting new trials.³⁴ However, it is well settled in the United States courts,³⁵ as well as in most of the states, that counsel can not especially argue questions of law decided by the court, or upon questions of constitutionality before the jury. Nevertheless, the Supreme Court of Indiana adopted the view expressed in the case of *Callender*, where it was argued that, "Since then the jury have a right to consider the

³⁴ *Robinson v. Adkins*, 19 Ga. 398, 401.

³⁵ *United States v. Riley*, Fed. Cas. No. 16164, 5 Blatchf. (U. S.) 204; *United States v. Columbus*, Fed. Cas. No. 14841, 5 Cranch (C. C.) 304.

law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution.³⁶ The ruling of Mr. Justice Chase in this case was made one of the grounds for his impeachment before the Senate of the United States. But the rule in Indiana in civil cases is against argument of law to the jury.³⁷

In criminal cases, the leading states of Massachusetts, Indiana, Illinois, Maine and other jurisdictions maintain the right for counsel to argue questions of law before the jury; but this, in some instances at least, is because of a constitutional provision. The leading case in support of this doctrine is that of *Commonwealth v. Porter*,³⁸ where the following able opinion was rendered by Chief Justice Shaw: "In thus conducting a jury trial in a criminal case, with a view to the return of a general verdict, it is obvious that the whole matter, of law as well as of fact, must be stated and explained to the jury, so that they may fully understand and apply it to the facts; because, as we have seen, in the form of a general verdict, they are to declare the law as well as the fact. For this purpose it must be necessary, and in our state it is the usual practice, for the parties respectively, by their counsel, to state the law to the jury, in the presence and subject to the ultimate direction of the judge, because unless the jury understand the rule of law, with its exceptions, limitations and qualifications, they can not know how to apply the evidence, and determine the truth of the material facts necessary to bring the case of the accused within it. In thus presenting their respective views of the law to the jury under the direction of the court, for the better information of both the judge and the jury, great latitude has been allowed in the practice of the commonwealth, and counsel have been permitted to state and enforce their views of the law, especially in capital

³⁶ *United States v. Callender*, Fed. Cas. No. 14709. See also *Wharton's St. Trials*, 688.

³⁷ *Heagy v. State*, 85 Ind. 260; *Blizzard v. State*, 77 Ind. 527.

³⁸ 10 Metc. (Mass.) 263.

cases, by definitions and cases from such works of established authority as the court may approve. In this great latitude has been allowed, in tenderness to the accused, and a liberal confidence reposed in counsel called to defend the accused in the hour of his trial. But such an address, whether it be upon the matter of fact, or matter of law, and whether in fact it be directed to the court or jury, is, in legal effect and actual operation, an address to both; not because they have not several duties to perform and distinct questions to pass upon, but because it is one trial, carried on at once before court and jury, in which the judge must have a clear comprehension of the evidence conducing to the proof of facts, which may or may not render the accused amenable to the law, in order that he may give such direction in matters of law as the state of the evidence may require; and the jury must have a clear comprehension of the rules of law, in order to determine whether the facts proved bring the accused within them; and because the minds of both judge and jury, acting within their respective departments, must result in that general verdict of acquittal or conviction which is the proper determination of the cause. . . . As the jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this court are of the opinion that the defendant has a right by himself, or his counsel, to address the jury, under the general superintendence of the court, upon all of the material questions involved in the issues, and, to this extent and in this connection, to address the jury upon such questions of law as come within the issue to be tried."

In one of the jurisdictions referred to (Illinois) the story is told that in one case the judge instructed that the jury should judge the law as well as the facts, but added that it should take the law from the court unless satisfied that it knew more law than the judge. A verdict was returned contrary to the law as stated by the court and the judge re-

buked the jury. At last one old farmer on the jury arose and said: "Jedge, weren't we to jedge the law as well as the facts?" "Certainly", replied the judge, "but I told you not to judge the law unless you were satisfied that you knew the law better than I did". "Well, Jedge", said the farmer, as he shifted his quid a little, "we considered that p'int".

In conclusion, it may be said that in those jurisdictions where the English practice of making the argument to the jury before the instructions are given by the court is followed, for the reasons already expressed based upon the nature of a general verdict and the unity of a trial, counsel should be permitted to address the jury upon the whole case, both upon the law and the facts, nor should the court interrupt or check counsel in so doing merely because views of the law are being proposed not in harmony with the unexpressed ideas of the court, although counsel in the exercise of this privilege should never be permitted to argue questions of law with a view of contradicting a decision already made by the court. Such action would result in "presenting the unseemly and indecent spectacle of an attempt to appeal from the judge who is learned in the law and who is the official mouthpiece of the law, to the jury, who are unlearned in the law and who are not judges of the law except in the limited sense hereafter stated". However, the court is well within its rights to check any abuse of the privilege at the time of its commission, but otherwise the corrections of erroneous statements of the law made by counsel should be set forth in the general charge.

On the other hand, in those jurisdictions where the instruction to the jury upon the law precedes the argument of counsel, such argument should be confined in connection with legal premises to the propositions of law laid down by the court, and any discussion or reading from authorities tending to question the correctness of the law as laid down by the court should not be tolerated. It is commonly felt to be a

necessary precaution for the court to instruct the jury that their prerogative does not extend to any right to set aside, or modify, or refuse to follow the law as stated to them by the court, the argument of counsel to the contrary notwithstanding. Finally, perhaps the whole question of the right to argue law to the jury resolves itself into a wise discretion of the court taking into account the circumstances of the particular case, and in most jurisdictions there is no absolute right to argue the law to the jury at length and by reference to authorities even though the argument is made before instructions are given.

(2) AS TO DIVISION OF CONTENT.

The division of materials between the opening and closing addresses is a problem largely determined from the standpoint of fairness to the opposite side. The principle prevails that no point in argument should be presented before the jury to which an opportunity to reply is not afforded to the opposing party. Without this rule the closing speech might reserve for itself new material easily answerable, but not answered. So that, in general, the concluding argument must be confined to the issue and questions raised in the opening address and in rebuttal of the material presented by the opponent's discussion. Thus, authorities referred to without reading in the opening speech, unless also referred to by opposing counsel, are generally held to have been waived, so far as the privilege of reading them is concerned in the concluding address. Comment by opposing counsel in his argument upon a decision handed him by the adverse party will, however, give the attorney in his closing speech the right to discuss such decision. The concluding argument is in fact primarily a rebuttal and subject to the general law of rebuttal, that it can not in any way introduce new material. However, it lies within the sound discretion of the court to permit

evidence to be introduced later under rebuttal in case of accidental overlooking, or through inadvertencies of some kind, and the same power applies not only to the question of evidence, but also to the material of argument.

Prevention of the opportunity to reply to argument has been attempted by counsel of both parties in a trial. By waiving the making of an opening address, one party has sought to keep the defendant in the dark as to his theory and line of argument. This practice has been distinctly disapproved by the courts, and the general rule has been, to require as a duty, that the party having the opening address, deliver to the court and opposing counsel the points upon which he means to insist. Statutes to this effect have been construed as mandatory, and as implying in the failure to do this the right of the court to allow the defendant's counsel to again address the jury. On the other hand the defense, by waiving its right of speech, has endeavored to cut off any concluding argument. It is extremely doubtful whether any such a right exists, for it usually ends in preventing the case from being fully discussed, inasmuch as in many cases where one counsel delivers the opening and another the close, the senior counsel is the one thereby debarred. A Michigan case upon this question holds that it lies within the discretion of the court, but that no such an absolute right is vested in counsel, and should be prevented by the trial court.³⁹ And a similar view was taken in an Indiana case already cited.⁴⁰ To hold the contrary would be in opposition to the whole theory of argument before the jury which is to assist that body through an open discussion of both sides of the question to reach a more intelligent verdict.

³⁹ *Barden v. Briscoe*, 36 Mich. 254, 257.

⁴⁰ *Citizens Street R. Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 316; *Conrad v. Cleveland, &c., R. Co.*, 34 Ind. App. 133, 72 N. E. 489.

Function of the Opening Statement of the Case.

Before the introduction of any testimony, the counsel for the party sustaining the burden of proof makes a statement before the jury in which he sets out the issues to be tried and what he expects to prove in substantiation of his side of the case. Mr. Chitty has summed up the contents of this statement under four heads: "The opening address usually states first, the full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable; secondly, at least an outline of the evidence by which those claims are to be established; thirdly, the legal grounds and authorities in favor of the claim or of the proposed evidence; fourthly, an anticipation of the expected defense, and a statement of the grounds on which it is futile, either in law or justice, and reasons why it ought to fail."⁴¹ Mr. Chitty has, of course, here given the English practice, and as to the first three provisions there would be no difference in our own procedure, but the last one has been prohibited in some American jurisdictions and the rule laid down that each party in his opening statement must be confined to his own side of the case, that is, the plaintiff must not anticipate the defense to be offered and his answer thereto, the defendant likewise to a statement of his answer to the plaintiff's case and not in turn anticipate a reply to such answer and how it is to be met.⁴² There can be no doubt that this is the better practice, for indulgence in anticipations either in the pleadings or in the opening statements, may often go wide of the mark and result in needless expenditure of time and energy.

Furthermore, the right to state what shall be proved and how it is to be proved is a source of most ingenious error.

⁴¹ 3 Chitty Pr. 880. See also *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788.

⁴² *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31.

Evidence to be deduced is not evidence deduced, but a vigorous and clear statement of the former may to an uncritical jurymen transform itself unconsciously into the latter during the process of the trial. The tendency of the advocate is not so much to misstate the principal facts which he has testimony to prove, but to add details of which he has no testimony or which by the laws of evidence may not be admissible. It is the duty of the judge to keep this right within its proper boundaries. Says Mr. Justice Graves: "The decisions unite in substantially denying the right to get before the jury a detail of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent;" and further, "a brief summary or outline of the substance of the evidence intended to be offered, with requisite clear and concise explanations, are considered proper. But a relation of expected oral testimony at length, or a reading of expected documentary proofs at large, or any other course fitted to mislead the triers, should not be tolerated. Of course there may be cases and instances where the statement of the evidence itself, or a reading of a paper, may be convenient and harmless. Such, however, must be exceptional, and not within the spirit of the general requirement."⁴³ It follows, necessarily, that the evidence deduced during the trial is not confined to the statements set forth in the opening address.

Not infrequently also, unscrupulous counsel, or even tactless counsel, may find in the opening statement an excellent opportunity to get before the jury irrelevant or prejudicial matter which could not otherwise be introduced. The field of possibility in this direction is too large to warrant the presentation of examples. Suffice to say, that the offense ranges all the way from a pointblank blundering revelation to an insidiously worded and deliberately planned and com-

⁴³ *Scripps v. Reilly*, 35 Mich. 371, 392, 24 Am. Rep. 575.

mitted innuendo. Since no self-respecting advocate could be induced to resort to such tactics the court, whose duty is to repress every effort of this kind, usually enforces the rule with the promptest vigor. While the limits of privilege allowed in particular cases in respect to the contents of the opening address are largely within the discretion of the trial judges, yet they are subject to revision on appeal in cases of manifest abuse.

It is plain that the province of the opening statement is primarily one of instruction rather than argument. Especially upon questions of fact there is as yet no foundation from which to argue made. No evidence has yet been introduced in the case of the plaintiff from which inferences may be properly drawn. To argue from hypothetical facts would be a very dangerous proceeding. The purpose then is to prepare the jury and court by furnishing cues to assist in the interpretation of the evidence and argument to follow. In order to facilitate such exposition a diagram or picture when properly made and admissible in evidence is sometimes permitted to be exhibited in the opening statement under circumstances requiring exact ideas of location. A denial of such privilege has been held to be error.

Obviously, the opening statement of the defense stands in a somewhat altered position. Regularly, he does not open his case until the evidence for the plaintiff has been presented and the latter has rested his case, although this order is not followed in all jurisdictions. Unless he have an affirmative defense of some kind, his preliminary, as well as his final address, will be matched to fit as a rebuttal to the plaintiff's case as outlined in the pleadings and by the evidence so far deduced. For him his task is laid out by what has already been done. Outside of inconsistencies in the testimony, or absence or inadequacy of testimony, the defense will have no basis as yet for argument founded on a comparison of witnesses and testimony between the two sides, hence he usually

reserves the weight of his discussion for the final address. However, when he has an affirmative defense, it is equally essential with the duty of the plaintiff to state what he intends to prove in connection therewith, and he is subject to all of the rules and regulations which governed the plaintiff in the same relative position to subject-matter.

CHAPTER XI.

THE ESTIMATION OF DELIVERY.

Importance of Effective Address.

Reasoning in the form of argument either oral or written is fully as much a matter of art as it is of science. Thought will not express itself either in word or gesture without a conscious effort, and whatever may be claimed for spontaneous expression is largely the spontaneity which comes from previous preparation and training. Argument must be more than spontaneous in style, it must be effective and forceful in delivery. Most of the argument in legal practice as well as in other phases of life finds itself at some time expressed in oral form. For this reason we shall have occasion hereafter to point out somewhat extensively how the brief maker must keep this fact constantly in mind while constructing his written outline.

As a result of the fact that an art is the outward expression of some system of perfected habits of co-ordination in the brain and body it follows that the delivery of any argument should be prepared for by a carefully laid foundation of written expression. Such written basis need not be a completely worded-out discourse and in major part should not be so, but it should always be at least a well articulated outline brief of the course of the logical movement. This gives the mind an established background of sequence and subject-matter in a fixed form and thus relieves the mind from extemporaneously blocking out the main lines and frees it for extemporaneously and spontaneously filling in and bodying out with minor details and elaboration. By this method a delivery will be insured of substantiality and adaptability, two very fundamental qualities.

However, an address to a jury often demands something

more than a mere recourse to the bones of argument, now and then the subject must be enlivened with dramatic effects and these are best secured by a careful preparation. A splendid climax, a graphic description, or a thrilling narrative is often the very turning point in a logical argument as well as in a more popular form of address and fine delivery along these lines depends, in the case of most speakers, upon a basis of completely written manuscript. This especially composed material, however, should cover only such portions of the speech which call for the dramatic element in delivery. Thus a well prepared manuscript will contain a main body of argumentative outline interspersed where needed with completely worded-out special paragraphs or parts.

In this way it occurs that the problem of memorizing the speech assumes two aspects—that of fixing the points and their logical sequence in mind and committing verbatim such portions as have been elaborately composed. This brings up the question of the most economical and efficient method of memorizing, for most people find considerable difficulty in committing to memory and many are very distrustful of their ability to recall the matter with the proper fluency. Of course a blundering effort to recall, thereby exposing the fact of previous preparation is not to be thought of, but such a breakdown is altogether unnecessary and the advantage gained by such preparations ought not to be sacrificed at the altar of a lack of confidence. A speaker who trains himself to speak *ex tempore* from memorized outlines becomes very adept in the art of shifting his mental scenery. Where it is too difficult to improvise fluently and with sufficient dramatic effect he easily transfers to prepared language material, and if the memory fails he very composedly so intermingles it with spontaneous expression that the hearer is astonished at the facility of his spontaneous expression. In this way a speaker acquires a reputation for great mental resourcefulness and latent ability, and many a burst of spontaneous

eloquence which to the audience welled forth from an overflowing mind and heart was no more than the bursting of a well loaded, wrapped and primed oratorical shrapnel shell with a timed fuse attached.

The successful delivery of a speech of whatever kind, provided it rests upon a systematically prepared basis of thought and language, requires a preliminary time element for the maturing of the neural habit impressions made by such preparation in the brain. There is nothing of which modern psychology is more certain than that properly timed repetitions are essential to give the memory holding power. Memory has both a "catching on" end and a "holding on" end just as does attention in the first step. Hence it is highly important to follow the laws of nature in this respect. For it may be positively said that in the case of committing and giving an exact reproduction of written language, not until the text of the discourse has literally disappeared from view and the thought become uppermost in the consciousness is a masterful delivery possible. All professional lecturers understand this fact and hence usually become more eloquent as time and repetition reduces the language to the position of the unconscious carrier of thought. But had not the language channels been perfectly constructed in the beginning no such eloquence would have ever been possible.

This being true the process of memorizing becomes a very important factor. Since, however, the memory consists largely in forming and deepening of associations much depends upon the deepness with which these are made, their correctness and the accuracy with which they are repeated. And this, too, involves a double set of associations, those contained in the idea relations on the one hand, and those contained in the motor, vocal and gesture relations on the other. Now the order of these should always be thought relations first and language motor relations second. The reason for this lies in the paramount key to the art of de-

livery that the thought relations become cues for the recalling of language. All language has been developed in man's experience at the call and in response to the needs of ideas and thought, and every idea is associated with a group of words which are instruments by which to express it under different relations, hence to take advantage of this body of acquired habit the thought to be expressed should be memorized first and then to connect with the appropriate order of words. This will make the second process much easier and will also tend to keep the language in the background as a means to an end as it should be. To reverse the process is a most pernicious and costly error, making the language act as a cue for the thought which will then lag behind and the signs for the proper intonation, inflection, emphasis and general interpretation of sentiment will not be on hand when the words are being spoken. The result will be an empty vacuous state of mind, great liability to forget the exact word in a critical place and a consequent strain, lack of confidence, finesse and power throughout.

First of all therefore let the main thought divisions be indelibly fixed in mind both in respect to meaning and order and especially why the one point immediately follows another. These topic thoughts should be in argumentative discourse single conspicuous statements and neither single ideas nor phrases. We argue propositions only. When the relative position in the whole scheme has been so vividly planted in the mind that the speaker can discuss each one of these propositions separately and can follow instantly the next topic in order, then the subordinate points under each may next be worked out in their logical order and setting. The best way to fix a point is to isolate its specific meaning and exact content by reflecting upon it until it is absolutely clear and distinct in mind. This done it should then be studied in relation to its connection with the succeeding point. A logical chain of inferences will thus be

built up in the memory. Usually the connection between points will involve some detail of similarity, contrast, cause and effect relation, means and end or otherwise and the mind should dwell particularly and for some time upon this detail. In short, roads of connections should be specific and not too general and an element of the unique is a great aid to the power of mental transference. When once the mind can travel down the line of sequential ideas with rapidity, then repetition with continually longer lapses of time between the exercise will eventually establish the material firmly in the memory. Of course, unless the line of argument is designed to be made in a permanent position the number of repetitions may be greatly curtailed.

In some respects the second process of committing the exact language copy where this is desired is much more tedious and difficult. This should be a joint process of fixing words because of their fitness and relations to a precise thought or sentiment to be expressed. Under no circumstances should the words be committed as empty shells devoid of content, for this severs the natural thought cue and makes the mind in delivery oscillate between two processes, one the remembering of thought and the other a remembering of barren language forms. The two should become fused in the process, the words being recalled by the needs and presence of the idea. But as already suggested, the words need to be anchored not only to thought cues, but to the habit cues established by the oral and bodily expression of the words and ideas. The words should not only therefore be identified with the thought being expressed, but should be spoken orally, and better still aloud, so that the word is reinforced in memory associations with ideas, motor articulation and sound; add to these some form of bodily gesture and the word is literally surrounded by a group of suggestion aids both mental and physical. Thus every sentence should first be read slowly so that both form and content may be noted

together and the rhetorical qualities be observed. In this manner fixate each word unmistakably as to identity and place, and never permit a synonym or substitute expression, or an omission to take the place thereafter of a word thus established. A deviation thus committed induces with great persistency a repetition and counterassociations grooves once formed become extremely obstinate and dangerous.

The 'memory cue which facilitates eloquence as already mentioned must be that of idea and thought recalling word and sentence, not vice versa, since the latter impedes interpretation by demanding a double circuit of association from language to thought and from thought again back to language and articulate expression. The committal should therefore proceed from the thought element expressed in sound rather than sight. After a first accurate visual reading the eye imagery of the language should be discarded because the verbal memory through a sight of the printed symbols has a tendency through constant habit to fixate the spatial position of the language upon the written page, and this is what stultifies freedom and rapidity of expression. Once the language has become relatively automatic so that the mind is relieved from any positive effort at recall the next step in a finished delivery is a correct interpretation.

The Interpretation.—It may sound strange to speak of anyone interpreting what he has himself written for the especial occasion since we usually think of interpretation as relating to the product of others. But it must be borne in mind that to think a subject through clearly and to express it adequately in composition is quite a different thing from interpreting those same ideas and embodying phrases in appropriate sound and gesture.

The process of delivery is that of translating a line of idea and thought relations into sound representations—but it is much more than this. It is the comprehensive process of translating whole bodies of thought into staffs of sound

and waves of intonation. Proper thought interpretation is a species of intellectual music, for there is a neverending of cadences, pauses, balancing and sonorous melodies which serve to bring out the values of imagery, principles, sentiment and emotion. No field for dramatic expression rivals that of the lawyer at the bar when he argues before a jury the vital interests of property, freedom and the issue of life or death. He of all men should be a speaker worthy of his cause.

Many limitations upon the thought which are easily expressed in the spatial arrangement of the printed page must now be wholly provided for by inflection, emphasis and tone alone. The crucial importance of these factors becomes at once apparent. Moreover since a familiarity with the finest effects of the voice must be cultivated by the young speaker and built up as a permanent, appreciative standard, the most effective time to implant the highest interpretative finish is at the outset when no habits are formed and no bias exists to be overcome. This is not only true in developing permanent speaking ability, but also in producing the best results in the delivery of a particular argument. A slovenly shifting of modes of delivering special passages in rehearsal without notice or scrutiny inevitably ends in the failure to detect the more delicate and appropriate rhythm and cadences. Let an artist in any other field perform indifferently, in a short time his art will begin to deteriorate. For this reason each emphasis, intonation and inflection should be most carefully studied and tested, and having selected the best effect its exact repetition should be adhered to with the greatest tenacity. In due time all effort to maintain the special complex will have disappeared, the delivery will become semi-reflex and true eloquence will supersede mere performance.

When the respective values and character of the argumentative propositions and points become so well memorized that they fall into a complete perspective before the mind,

and, in addition a set of supplementary tone values begin to fit and associate themselves around and through these units of intellectual power, then the question of speed distribution arises. Speed relates itself naturally to emphasis and in two ways, to wit, when the emphasis is placed upon values in sensibility as exemplified in tragic narrative or grand climax it is promoted by an increase in rapidity, but when the emphasis is to fall upon the meaning, it is conversely enhanced by a greater deliberation as is shown in the drawing of analytical distinctions and antithesis. Thus too much speed in intellectual parts produces an effacing of delicate discriminations while too little speed in emotional parts produces a labored and dragging impression. The proper distribution of speed, therefore, both in the general movement and in the local settings becomes seriously important. Some speakers are too habitually slow and others too habitually rapid. A speech should neither be rapid nor slow as a whole, but should be a well proportioned combination of both.

Relatively considered the speed should increase gradually from the beginning, acquiring special acceleration when approaching climaxes and as often becoming subject to abrupt relapses for the sake of contrast until the end is approached when the movement should perceptibly slow down. Sudden changes in speed naturally take place where some new division of the discussion calls for a return from impassioned delivery to deliberate exposition of the ensuing topic. In this there results an economy of energy to the speaker and an economy of attention to the hearer. Again there should exist a continual shifting of speed backward and forward even in the rendition of ordinary passages. Certain groups of words should be passed over smoothly and without pause while others should be dwelt upon word after word for the purpose of mental saturation of their meaning and sound. It is this intelligent distribution of time which gives variety

and life to delivery and breaks up the long drawn out cycles of monotony.

Along with the dextrous control of speed to punctuate the movement into periods there must be interposed many pauses varying in length from a mere breath catch to the long dramatic suspense known as the oratorical pause. These suspensions are in no sense identical with those ordinarily obtained in the rules of punctuation, but may freely divide and hold apart words and groups of words which no grammatical structure would sanction. No rule for the proper installation of such pauses, however, can be made for it all depends upon the context not of meaning only, but of contingent sound. The test is that effect which satisfies the total impression of proportion and harmony to a refined ear.

The Plane of Intonation.—There must be a plane of delivery as well as a plane of thought and it is fully as essential to maintain the one selected throughout in the former as in the latter. All details of delivery are relative values of sound only and are adjusted to each other on the basis of a permanent pitch. The elevation of this pitch has theoretically nothing to do with the minor variations of tone, but in practice the contrary is true. Each individual in life becomes habituated to a particular pitch or key of the voice depending upon the length and development of the vocal chords. The relative range of notes above and below this plane has through long usage become more or less complete, but if the key or plane be raised or lowered to any considerable degree the upper notes are pushed above the tension capacity of the larynx, or sunk below the resonant capacity of the membranes, thus destroying the wide variation of the voice. As to what is the most efficient plane becomes therefore an individual matter, but in general is the ordinary, familiar, medium tone. According to the law governing the efficiency of all communicative media it must be that plane which for the particular person attracts to itself the least attention.

For the reasons given the only natural and safe plane to each individual is that employed in colloquial address. Every speech therefore should be adjusted to the proper key plane by opening in a simple conversational tone which will at once guarantee the greatest ease, the widest range and the least affected style possible to that speaker at that time. To strike this accurately no conscious effort should be made to pitch the voice at all, but merely care should be taken to make one's self heard clearly and distinctly. The greatest temptation to lift the voice above its natural plane is caused by the fear that the voice is not carrying sufficiently and the popular supposition that carrying quality in a voice is produced by an increase in pitch. On the contrary, a low voice may carry excellently, provided the articulation is cleancut and the membranes of the mouth and throat are healthy and resound well.

If the method suggested be observed the pitch will adjust itself. Of course this does not imply that a voice naturally pitched on one key may not by systematic training be changed to another. However this fact in no way invalidates what has been said touching the proper conditions for any particular address. The violation of vocal conditions by assuming an unaccustomed plane at once increases the strain and effort of speaking, induces false intonations and not infrequently results in sudden and embarrassing breaks in the voice. A very slight variation from the normal tone will soon produce great fatigue just as does the associated error of speaking louder than usual. Safety in both pitch and loudness lies in keeping to the tone rendered most easily, and if this be at fault to train under other circumstances for its improvement. Better for the sake of the effect have a clerical whine well whined than a Ciceronian apostrophe collapse into the ridiculous.

The amateur finds considerable difficulty at times, after having increased in volume speed and force in making a cli-

max to successfully return to the previous rate of delivery. Like the proverbial negro preacher, he does not climax so much as he climbs and waves his arms until exhausted at the imaginary heights above him. If he does succeed in cutting the ascension rope he goes to the other extreme. The abrupt, final and sudden changing of so many elements tends to confuse his ear and in place of merely relapsing to the lower level he consciously puts his voice down and puts it down too low. This defect is a serious blemish and advertises the whole delivery as a somewhat faulty piece of veneering. Nevertheless the fault is ordinarily but an imperfect point in what may in other respects be a very solid piece of work. Such faults which are more obvious than they deserve to be usually attend the efforts of the untrained speaker and hence should be eliminated at once by careful discipline in sound discrimination.

The Visual Expression.

The Appearance.—The physical visual man must inevitably furnish a background of appearance for all that is said and done. From the moment the speaker appears before his audience he becomes the natural center of all attention. Certainly, therefore, such an objective point of observation must be strengthening or weakening to the general impression made according to certain principles involved, and what we would expect we find. These principles are expressed in terms of (1) strength, (2) vigor, and (3) agreeableness. This order indicates their relative degree of importance, but they vary considerably in detail among different species of speakers and speeches. Thus what would present an appropriate personal appearance upon the polite lecture platform would not be appropriate at all on some stuffy, hot afternoon in a crowded courtroom before a weary jury of plain citizens. Nor would the austere and formal garb of the aris-

tocratic pulpit be the most fitting decorations for a representative from Holdback county and district No. 68. These differences are not the creations of a day nor the ebullitions of fancy, but constitute the sturdy, common sense of the people concreted into definite customs which may be scorned but nevertheless observed. The fate of several would-be reformers along these lines are a matter of history in the Senate of the United States. To be odd and eccentric may bring a cheap notoriety, but is certainly no indication of greatness. It is well therefore that the speaker observe the traditions of the platform and leave it to others to spring innovations.

Strength.—Strength is a most fundamental requisite. A speaker may have a superabundance of energy and be pleasing in the extreme, but if he be lacking in the element of substantiality, of imposing stability, his efforts must of a necessity lose much—they may amount to little more than volatile essences or delectable perfumes—ephemeral though earnest. And yet this quality may assume a somewhat different aspect under different conditions. For example, strength may radiate from a pulpit behind which a slightly built man is speaking, seeming to spring not so much out of the physical proportions of the body as out of the convicting and unified expression of voice, head and gestures. On the other hand, the typical embodiment of strength in a lawyer before the jury appears to be that of physical stature. From the viewpoint of visual presentation strength is indicated most considerably by the pose of the body. Ponderosity of the tub or rolling varieties is rather an auxiliary of weakness. That posture is most powerful which simulates being rooted to the floor as a tree to the soil. This effect demands a firm position of the feet and the maintenance of the center of equilibrium indicated by a median line between the shoulders well over the center of gravity. A tilting, warped or leaning attitude betokens a muscular strain with its attendant

suggestion of uncertainty. The most conspicuous example of this fault is the third rate lawyer. He wishes in many cases to leave the impression that he is a veteran in the service and has reduced the paraphernalia of the courtroom to the familiarity of his private lounge. He therefore lolls while speaking against some chair or table, rams his hands into his trousers pockets, or lifts his foot upon the rung of a chair or the jury foot rail. Such abominable practices should not be tolerated in a court of justice, for they not only show a want of self-esteem in the offender, but they lower the right and necessary dignity of a court of justice.

The weight of the body therefore should fall full upon the feet, for if it fall upon the toes, the posture is that of anxiety; if upon the sides, that of cringing or shrinking, while if upon the heels, that of slouching and sluggishness. The full foot in a wide and generous shoe gives ample support and consequent strength together with a certain amount of elasticity sufficient to give vitality and power.

The effect of strength is no doubt very much increased by the proper physical proportions of the speaker. Large stature seems congruous with a large nature and a large nature with a generous mental endowment. Many great speakers have been large men. Gladstone, Webster, Calhoun, Voorhees, Brooks and many others are examples, but there have been notable exceptions. Since there exists no remedy for such a deficiency it may be well to add, however, that more depends upon the general lines of the figure than upon mere size. This accounts for the fact that some small men of commanding figure, as was that of Napoleon, seem far more impressive of strength than other individuals of great hulk and squabbliness. Not dead weight, but noble proportions, is what gives a figure forcefulness. Thus the head, shoulders and trunk should have a square blocked-out relief tending to massiveness, but not heaviness. Such an effect may be

much enhanced by proper dressing and much destroyed through inappropriate details.

For this reason the hair should be brushed loosely high across the forehead, and under no conditions should it be parted into two simpering curls from the middle. Such details are symptomatic of a tea-party mind. There should be the results of toilet, but none of its ostentations. The collar should neither be conspicuously high nor too low and never of the negligee pattern. The latter is appropriately adapted to outdoor life where great freedom of movement is essential and where physical labor is required—the speaker who presumes to exhibit the character of rugged and honest simplicity by appearing before his auditors in the costume of the field or workshop is playing an exceedingly cheap role which can never cover up his lack of the real quality. Simplicity he should have, but simplicity is not inappropriateness, and it is not rawness—it should be a dignified simplicity. Thus nothing surpasses the plain black tie of a size relative to the proportions of its wearer. If the occasion be that of a courtroom address it should be accompanied by a neat but loose fitting sack coat which need not be buttoned, and should not have its pockets stuffed with papers until its wearer resembles a mail carrier. However plain and business-like may be the clothes of an attorney, they should never be shoddy and baggy nor reflecting the polishing of years.

On the other hand, the dress suit commonly worn by the professional lecturer is rather the adopted uniform of the class than that of the general public speaker. The sack, frock or Prince Albert styles are all less brilliant but more conservative, and hence in better form for general purposes. The trousers should likewise follow the square-cut effect rather than follow the lines of the limbs too closely, coming well down upon the feet and neatly concealing any attempt at emblazoned footwear. To display an exaggerated specimen of peg-top pantaloons or a high-water cuff on the bottom

or to present the ridiculous spectacle of dishabille—one trousers leg refusing to come down—blunders which the amateur speaker of the present day is not infrequently making, is not a harmless incident, but very injurious to the serious impression which the offender desires to make. Immaturity is a handicap and inexperience a disadvantage without celebrating their existence in such an overt fashion. The make of the clothing as well as the figure and much more than the quality can do much in producing or destroying the appearance of strength in the speaker. As a whole, the effect should be plain but strong in every lineament and feature.

Vigor.—By this element is meant the amount of physical life and self-control manifested by the carriage of the body and the style of movement. A lumbering walk, a mincing step, a halting articulation, a nervous jerk or a slovenly movement, all or any indicate an imperfect development. Vigor is displayed not by blatant noise and beating of the bushes of imagination, but by an elasticity of frame, precision and dispatch in movement and a firm promptness of active attitude. Bench pounding and fist shaking are symbolical of the lion's mane rather than of the power of his jaw and limb. The feet must be picked up, not dragged; the hands expressive, not limp; the body taut, not relaxed, while the head must be steady and not roving. There must be a certain buoyancy about the whole figure, and this demands that the speaker be much alive, in robust health, in fine spirits, alert and responsive to the entire occasion. Much could be learned from the professional actor in this respect, whose entire success depends first of all upon these fundamentals. But while the public speaker should first learn to be a very spirited animal, he should in the next place be amenable to very perfect control, the lack of which introduces the question of agreeableness.

Agreeableness.—Composure, ease, grace and harmony intermingling produce this effect. Nervousness or excitement

are irritating to the hearer while manifest effort and awkwardness are equally distressing. To drop one's notes upon the floor, or shift a pencil back and forth behind the ear, or run the fingers through the hair, or tug at a watch chain or vest pocket or to range back and forth upon the floor are all evidences of mental uneasiness or perturbation and produce an echo of the same state of mind in the audience.

People believe what they enjoy as a usual thing and they enjoy a discourse in which the speaker is at least equal to the occasion and behaves as though he were conscious of the same fact. If the speaker is endeavoring to play a part and to render a performance upon an occasion which calls for no such exhibition of his talent, one may rest assured the hearer becomes aware of the false bottom to the effort. The speaker must be genuinely natural in delivery to ring true to the traditions of honesty and truth.

The speaker not only talks with his mouth, but with his whole body. Much more influence emanates from the physical movements of the orator than is generally supposed. As a consequence the body must not be tied up like a post nor hung together like a clothes rack. It must be a splendidly active and moving animal. However, all actions to be graceful and effective must depend first of all upon their relation to a fixed base. We have already referred to the need of an immovable background as the substratum of strength. Without this the arms become loose at both ends and the legs sawdust appendages. Every gesture and posture is a combination, when well made, of sinuous flexibility and stockiness. How shall these two extremes be brought into harmonious co-operation is the problem. For example, from the tips of the fingers to the trunk the muscular action should pass by degrees from a maximum of pliability to a minimum of the same, and from a minimum of tension to a maximum of the same. The proportion is as follows: The nearer the extremes the greater the passivity of muscular effort,

while the nearer to the body the greater the rigor and strength. This being true, the whole arm gesture swinging freely from the shoulder rather than from the elbow is a sacrifice in strength while the forearm gesture is a sacrifice in grace. The true function of gesture is to express through bodily movement, not the harmony of gyrations, but the character and thoughts of the man behind them. The individual is not there to make the gestures, but the gestures to disclose the individual. Gestures therefore should be fundamentally expressive and more than merely illustrative. They should be to the eye what sounds are to the ear, symbols; not simply water colors or cartoons for the delectation of the viewer. Experience in training reveals two extreme types of individuals: those who wield their arms stiffly and who are devoid of the element of suppleness. Their joints do not seem to be free nor their muscles under sinuous control. They seem to the observer to be placing the arm about as though handled from without rather than from within. It proves also somewhat difficult to remove the constraint. At bottom it is rather a psychological than a physical matter. The person has no adequate image in his mind of what the feeling is which accompanies the proper co-ordination. This is what makes the problem difficult. A vivid image of the proper movement is essential to voluntarily produce the movement, but it is necessary to first experience the right movement in order to develop such an image. Explanation of the difficulty has no efficacy in removing the fault unless thereby the person may be stimulated to experiment through imitation of good gesturing until through the accidents of exercise he at last hits upon the secret combination. Like swimming it is a combination of relaxation and rigor which demands a correlate experience in consciousness. On the other hand, many people are devoid of the rigor element. The arms are limp and expressionless and no effort seems quite able to put the proper

amount of steel into their gestures. The wrists seem hopelessly effeminate and the shoulders to lack hump. They, too, are suffering from the same malady of image anaemia. During early life they have failed to wield the hoe, grip the plow handles or feel the tremor along the rod and line when the sturdy splash comes. Perhaps no better method could be devised of acquiring these two elements of good gesturing strength of shoulder and biceps, coupled with flexibility of hand, wrist and forearm than to practice sports which will bring all of the dexterity and strength of the arms into play.

Not only do pleasing and effective arm movements depend upon a certain consciousness of how it feels to gesture well, but the movements of the lower limbs also demand "foot consciousness". It is seldom that the public speaker will unconsciously acquire the most appropriate habits upon the platform. Few are fortunate enough to have such imperfections pointed out before they become a part of what we term "our second nature". But it is well to remember that our "second nature" never takes a second seat before an audience. It is always on the front row, where it not only can be seen and may be seen, but usually must be seen. All instinctively good speakers feel and respond in some manner to the impulse for bodily expression. Words need to be backed up by some form of visual emphasis and illustration. Without judicious training and care these impulses will either find an outlet in inward strain and obstructed articulation or an occasional jerking or jabbing at random, or will run at large in great numbers of illy timed and excessive physical ebullitions. Thus the feet as well as hands will assume all kinds of "bizarre and ridiculous positions unless they are carefully disciplined to subconscious control. By practice they may be ordered at will to a position within the fringe of consciousness where they become effective auxiliaries to the pageant of thought as it passes systematically through the mind of the speaker.

Every speaker will in due time forget that he has hands and feet, and he should not do so to his sorrow; but if he has developed a proper movement platform consciousness he will never cease to experience the responsive feel of hands and feet when they work as an effective and reinforcing part of his expression. That is a distinction which is well worth every speaker's consideration. The cue in control of bodily movement in speaking is not a thought of the right movement, but a feeling of it, and in this way the course of thought is never for a moment disturbed.

It is not an impossible feat to so train the body that it will move forward in climax, retire at the moment of pause, sidestep when the gesture and eyes lead the way or throw back the head and shoulders upon an emphatic down gesture. Nor will the feet insist upon getting too widely apart nor to lose the center of support, nor to mince, nor to slouch, if they are groomed to the proper position. A successful means of developing foot consciousness and general confidence of position may be attained by standing while speaking in a position which requires attention. First acquire the ability to stand upon the edge of a rostrum in front, then with the offset close behind, then upon the side and finally mount upon a platform large enough only for the feet. Then combine such restrictions with the attention directed upward to the galleries. Turn slowly around while in the process of talking. Cultivate the sense of caution in the feet by moving while talking among articles disposed about. It is remarkable how soon the realization of position will become an automatic part of the general consciousness. As a rule, the lawyer is inclined to be too liberal in his court conduct. Especially the second or third rate practitioner is prone to exhibit a disgusting amount of the blase in his speaking manners. His actions and mode of speaking indicate a lack of proper appreciation for either the dignity of the profession or the refinement of the art. To use a fittingly

vulgar expression, he "slops over" and indulges in antics unbefitting the occasion or cause. This is seldom or never true, however, of the powerful advocate. A Lord Mansfield, a Rufus Choate, a Webster, Ingersoll, Voorhees or Blackburn has always conformed to the noblest and most exalted ideals of impressive oratory.

The form of correct speaking should be mastered not because celebrated orators have done so, but because this is the surest road to success. Nothing advertises great ability so much as the display of charming and forceful public speaking. And this is not only an opportunity to the practitioner at the bar, but one of his most practical and effective instruments of achievement. It represents capital stock of a high order—the very working tools of his art. For this reason it is important to consider still further details of the craft.

Dramatic Elements.—Expressiveness as a dramatic element in all forms of public address is a wholly distinct thing from the dramatic art as such. The fundamental purpose of the latter is to please through a purely representative skill of the thought or character of someone else. Oratory and oral argument on the contrary have the more serious purpose of convincing the mind and moving the will and through the science and art of presenting the speaker's own thought. To imitate the manners, postures, facial expression, tones and language of another constitutes the art of impersonation, while through such narrative imitation to represent the character of another is dramatic acting.

It should be needless to say that dramatic expressiveness in a speaker is a most valuable asset. It marks the dividing line between life and lethargy in an address. Criminal law presents a field in which every element of the dramatic resides in the subject-matter and occasion itself. Some of the most dramatic appeals in all history have been made before a jury upon a criminal theme. Nor is the need of a

more subdued and conservative dramatic element of impressiveness wanting in civil actions before the court or jury. The dramatic element in the latter sense is nothing more than a skilful interpretation of thought values. All thought in actions at law which express principles and precedents and facts and reasons are eminently worth while or should not come before a judiciary tribunal. Therefore it follows that adequate interpretation of such live issues should at least also be alive to a commensurate degree. To be alive, however, means to be expressive of motor action from head to foot. Thus action in its most specific form may be divided into that of the head, trunk, upper and lower limbs.

Beginning in the order named we may note first, concerning facial expression, that it should constitute a perfect reflection of thought and sentiment. Since it is the focus of attention it should be a powerful medium. This requires that the features be not flabby and expressionless, but muscular and sensitive; that the mouth suggest more than a slab, a pouch, or a pucker; that the eyes be wide awake and that the whole appearance be responsive and mobile. Wrinkles should not be avoided, for they are strong indices of character. A face without a wrinkle may look sleek and well groomed and suave, but can not be richly impressive. Abraham Lincoln had more of a visage than a face—it was so exceedingly irregular and such a book of history within itself. Fine mouth and eye lines are great exponents of intellectuality and when lighted up with animation seem doubly impressive. Without a well developed set of facial muscles, however, the lines are likely to follow the accommodation of fatty deposits and thus be less likely to bear strong individuality. In short, without flexible muscular action of the face it can not portray a high spiritual temperament nor reveal every passing sentiment and emotion. The danger in face lines is that they may too truly publish a sore, crabbed or revolting disposition. The good man need not be afraid

of his face; the evil man always. For reasons now clear, the face should be clean shaven so that the best effects of chin and mouth are possible. So also perfect pronunciation and the carrying quality of the voice depend largely upon the contractile adjustment of the lips to the teeth. Loose lips that part and fall outward when relaxed need gymnastics of the contractile muscles. Much and continuous practice is the only efficient remedy for all such defects.

During an address the head becomes a very telling instrument of emphasis when properly controlled. A good head for speaking is one set squarely upon the shoulder. Many people and some speakers do not carry it there. There are many unevensided people, one hip or shoulder being lower than the other, with the result that the head is thrown out of balance and inclines to one side. If it does not do this it may seem to pitch forward even when the shoulders are fairly well back. Whatever the habit, the correct position is one which neither simulates being tied to a flagstaff nor hung from a crane, but an easy, upright, firmly planted equipoise. The head under the stress of public utterance should never swing from side to side like the undulations of a polar bear, nor duck forward and up and down like a bob on a fish line, but move decisively from a base of firm neck muscles. When properly co-ordinated with the arm it gives much ictus to all downward gestures and should move in perfect harmony and concert with gestures in order to render the whole effect rational and interpretative.

The action of the trunk is naturally less pronounced. The body should always front squarely towards the hearer, be held erect and never assume a leaning or lolling posture to the side. The shoulders should never be permitted to lop forward under the stimulus of earnestness, but rather thrown back as a step is made forward or a downward stroke executed. While the weight of the body should be rested as occasion requires, now upon both feet and again upon one or

the other limb, it should never induce the frame to slouch down upon the hip like a hand thrust into a pocket, but the body should maintain at all times a sufficient muscular tension to preserve dignity. Finally the trunk should possess the quality of sturdiness rather than exhibit the peculiar effect of liteness which the actor in his bolder range of movements finds so artistic.

The next overt action in the order followed belongs to the arms and legs. These organs are instruments capable of the most perfect grace and force of expression, but are frequently nevertheless the most ridiculously awkward appendages. The arms, for example, under the spell of embarrassment become strangely stiff, sometimes crooking at the elbows with a torsion twist of the forearm. So, too, the hands will unconsciously clasp the forefinger or thumb and twitch nervously. Without the most careful training the arms and hands are prone to take on the most inelegant and boorish habits, such as thrusting themselves into pockets, swinging hooked from the thumb or again toying automatically with a coat button or watch chain. A wise precaution in learning to speak is to hold a small article in the hand and to begin with very simple forearm movements, holding the elbows well against the body. As a rule, it is easier to discover freedom of movement in whole arm gestures and once the disposition acquired it is very hard to inhibit and tone down to perfect forearm and combination gestures. It is not so difficult to find oneself in movement only, but movement is not gesture. The danger is not infrequently for movement figuratively to run away with gesture. Gesture is trained, inhibited and controlled action while movement may be merely the spontaneous ebullition of motor energy. For oratorical and argumentative purposes the wide range, full extended, sweeping arm movements are not needed. They are highly dramatic and are more illustrative and sensational than expressive. All such extravagances and strik-

ing attitudes, such as turning away from the audience, walking with long strides, striking at imaginary foes, lifting fallen bodies and similar examples are all, it is needless to say, the capital in stock of the actor and have no place in sane public address in the expression of sober thought and even in impassioned climaxes there is no occasion for impersonation of the maniac.

The foot action of the public speaker is generally more unpretentious since any considerable breadth of movement here partakes at once of stage maneuvers. Of course courtroom speaking differs from rostrum speaking in the fact that the one stands above the level of the hearer and looks ahead and down while the other stands below the level of the court or jury and looks ahead and upward. Obviously, the first position discloses the feet more openly and conspicuously than does the second. For this reason the lawyer may indulge in more carelessness in this respect without penalty than his colleague of the stage. And he not infrequently passes beyond even such a license fairly running back and forth along the jury box and shouting into the very faces of his imprisoned listeners. Now as a matter of exact truth little sidestepping is advantageous in public speaking while marching up and down is the "malum in se" of the abominable.

However, the position of the body should not be stationary, but easily shifted within a conservative range for purposes of ease and rest and convenience and effectiveness. One rule should always be followed in making these foot movements, that they should never be executed independently of the thought under presentation. They are fundamentally almost as effective or distinctive to the general delivery as the movement of the arms above. In fact, there is an excellent mandate to the effect, namely, never to change position upon the feet between sentences, but only during delivery of words or between paragraphs and topics. Thus the forward

step naturally accompanies passion or climax in oratory, but in acting often the reverse, while the backward step marks the natural recovery after a prolonged, ascending, advancing period. A receding step being of a negative character denotes a resting pause while the forward or side step must accompany and thus supplement the delivery itself. It inevitably follows that movements which are disjointed from the process of thought and delivery are aimless and serve to break up the complete harmony of the address. All told, action to be effective, if not eloquent in form, must have the attributes of ease and precision, free and unrestrained, perfectly timed and appropriate to the immediate demands of thought and sentiment, to accomplish which is an art requiring long cultivation when necessary to liberate a body confirmed in improperly co-ordinated motor habits.

The delivery of a legal argument will be affected in mode to a considerable extent by the kind of subject-matter under trial. All rights under the law beget a lively interest in those most concerned, and there are always some who are most concerned. Civil cases, however abstruse, are therefore not "dry bones" in any sense, and he is a very poor lawyer indeed who will not enthuse over the brilliant exposition of legal principles. The inspiration to this kind of address must spring more largely out of the appreciation of the system of law and the masterful skill of application than out of the response of an audience. A delivery suited to such subject-matter will of necessity while earnest and forcible be robbed of the more picturesque elements of imagery. Nevertheless some lawyers manage to pronounce a eulogy even upon the selling of a cord of wood. They have a diseased imagination which does not distinguish between real and fustian occasions for sentiment. A stolen rooster will provoke in them as mighty a flow of rhetoric as it takes the downfall of a republic to produce in another. Sober issues demand sober, dispassionate treatment, keen razor edge analysis and a

logical directness and forcefulness of speech which leaves but one conclusion in the minds of the audience.

On the other hand, criminal practice is replete with dramatic possibilities. The man in chains is on exhibition. The "life of the hunted" is under peril, the majesty of the state is provoked and the judgment day is at hand. Not only is the jury prepared to face a grave responsibility, but the courtroom is usually packed with a mass of eager humanity and surcharged with an atmosphere of latent excitement. It is in the center of a scene like this that many a masterpiece of forensic argument is made and unfortunately for all concerned unpreserved of record. Among the topics which furnish materials of strong appeal to the human mind must be selected the points for great climatic effort. Every speaker who aspires to be a successful advocate does not spurn a systematic method of persuading the mind. Unless the verities of life and the issues of life actually involved are dramatically set out they fail to be reckoned at their true valuation in the case. On behalf of the state an appeal to the majesty of law, the honor of the state, the duty of good citizenship, the necessity of order and the enforcement of law produces an impressive effect while a call to the support of justice, the protection of society and the sanctity of the home never fails to touch a responsive chord. So also a vehement disquisition upon the forfeiture of human rights and the serious nature of an oath to render fair and impartial justice are often employed by the prosecution with telling effect.

In a corresponding manner the cause of the defense furnishes abundant material for thrilling climax. Such themes as the sacredness of human life, the inability of one life to pay for another, the ancient bloody law of vengeance, the high and lofty exercise of mercy, the sufficiency of the penalty of remorse, the immutable presumption of innocence and the futility of punishment as a deterrent are all capable of

great oratorical embellishment and power. Or the more logical principles of the inability of absolute proof, the natural bias against a criminal offender, the justice of measuring penalty according to the gravity of the offense, the presence of mitigating circumstances and a host of other grounds for clemency and in defense may be urged and elaborated with powerful effect in the hands of a masterful speaker.

The particular style of delivery as a whole will also depend considerably upon the plan of argument adopted and this will depend again upon the nature of the case. Several distinct species of plans will be presented later under the subject of briefing and more or less detail will be given concerning the adjustment of a brief to the needs of delivery. Suffice to say in conclusion and anticipation of such discussion that an argumentation may have a background of circumstances under treatment which will at one time demand extensive expository work, upon another occasion center about description, and at still another time resolve itself into a running form of narration. An expository delivery is primarily earnest and emphatic without the fervor of emotional rhetoric, a descriptive delivery full of word painting, dramatic and brilliant in imagery and feeling while a narrative delivery is naturally electrified by movement, action, episode and thrilling expectation and denouement. The successful advocate must be ready to adopt and execute almost every instrumentality of logic and oratory and to blend them into as many different combinations and effects as a complex world of events weaves into the subject-matter of litigation.

CHAPTER XII.

ESTIMATION OF FACTS.

Ascertainment and Grouping for Trial.

The groundwork of every action in law is some set of facts—not one, but a group of facts. These surround a nucleus or central fact and thus are related to a primary root fact in varying degrees of intimacy. This bunch, if it may be so expressed, of factual material, is described by different names according to how large or small a circumference of connected facts is included. For example, the terms “res gestae”, “subject”, “subject-matter” and “transaction” are all used in this connection approximately in the order of increasing expansion given.

Now the initial step in a suit at law is to ascertain just what the facts are. This would seem to be a relatively simple matter to the novice in the practice, but as a matter of experience, presents considerable difficulty. Many a case has been lost because the attorney relied too fully upon what his client had told him, for it is an observation of experience that a client will conceal his opponent's case, apparently because it is painful to contemplate and deny the facts which are derogatory to his own cause, or because his pride prompts him to desire to appear in as favorable a light as possible before his lawyer, or because his prejudices are so aroused that the facts in his favor loom extravagantly large while those opposed insignificant. Probably a combination of all three of these causes makes it necessary to examine the client with great care. And thus the client himself becomes the first important fact to be estimated by his counsel.

Usually the client will need some preparation for the trial, assuming that the facts disclosed to the judgment of the attorney warrants an action. His mind will generally need

to be educated into a proper frame to meet the test. Sometimes his knowledge of the subject from a legal point of view must be expanded to calm down his ardor and render him more cautious. Sometimes his preconceived ideas of law make him, figuratively speaking, want to run with the bait and conduct the suit himself, in which case he must be firmly suppressed. Very few clients appreciate to what an extent their own personal appearance, speech and behavior will influence a decision. Being the center of interest at the trial, all eyes are turned critically upon the litigants and few persons are present who do not feel impressed more favorably by one than the other. It is a process of general public estimation of character, present at all times, and in all places where men observe their fellow men, but in a law trial brought to the stress of emphasis. The situation, as it confronts jury and public, is: Here is a dispute, maybe a quarrel, possibly even a feud between two or more persons. Which one now is in the wrong? Which is guilty and which innocent?—And the mind proceeds to compare external evidences and check up the results at once, with the effect of a premature advantage of one over the other. Thus the lawyer must size up his client's "makeup" and reduce it to the standard of public approval, if not sympathy. The appearance must be respectable and clean, clothes neat but not snobbish, manner deferential and unassuming, words careful but full of simple conviction. To be sure this task may involve not a little tact and patience on the part of the lawyer, but he should make his client understand that to obey orders is the first element of success in the relation of client to his legal representative. His desire to win will, as a rule, overcome resistance to practical suggestions.

Assuming that the client has revealed truthfully all of the facts in his possession, the ground work is not yet sufficiently laid. The witnesses should be next called in and closely questioned and cross-questioned upon every point disclosed by

the client himself. Other facts will now come to light. When this work is completed the situation still lacks completion. The talk of the street may not be good evidence in the trial, but it sometimes gives a clue which leads to a further "find" of good evidence. So the lawyer should learn the drift of current talk and opinion without exposing his own views, yet this is not all. These facts must now be estimated, sorted out, and reduced to order, for he has now in his possession a promiscuous and oftentimes motley array of all kinds and conditions of material. The first step in this valuation must be in relation to himself.

The lawyer must, in so far as possible, corroborate the facts collected by him through the testimony of others, in his own experience. He must himself, whenever feasible; see, feel, touch, taste and smell these particular facts, and from his own experience check up, measure and correlate the values which he finds. This gives his mind the salt of conviction and certainty which is a prime requisite in a trial at law. To do this requires, in some instances, that he visit the ground where the affair took place as soon afterward as possible. Here he should carry out a systematic program of investigation. With his facts before him, he traverses the exact spot and surrounding locality, noting correspondences and differences with the evidence in his pocket, and picking up much additional detail. Should there have been any objects which have been taken into custody, he should of course minutely examine these also. In addition to these observations, he should now apply a map of atmospheric conditions since the date of the occurrence. There may have been rainfall, snow, hail, high winds or floods, or acts of man, or movements of beast, which have modified the face of the locality. If so, their probable effect must be computed with the most extreme care, taking into consideration windbreaks, obstructions, waterdraws, elevation and depression, direction of drainage, public roads, paths, etc., in reckoning the effects

produced. Sometimes also a quick growth of vegetation will work a radical change of condition. Then, too, a still more uncertain factor must be considered. Usually upon the happening of some unusual event people will rush to the spot and trample out, or unconsciously destroy the evidence which would have proved convicting or otherwise. Telltale tracks or marks are thus often obliterated. In a famous murder case in Indiana¹ the crime was rendered a hopeless mystery by this indiscreet performance on the part of excited curiosity seekers. Thus, the visitation by human or animal life upon the ground must also enter into the calculation.

With the mental picture of the entire situation firmly and vividly fixed in his mind by first hand observation, he now returns, and forthwith calls up his client and witnesses once more. He wishes to do two things—to discover whether they have a knowledge of the additional facts which he has discovered, and to explain apparent contradictions in the evidence so far deduced. Incidentally he will also note whether their later testimony agrees in detail with the former—a critical matter from the standpoint of value, for these are the points by means of which the opposition will attempt to break through the armor. Such a method calls for written testimony upon the first hearing, and while this will be tedious the outcome will more than pay for the trouble. Better to make corrections here than to try to explain inconsistencies and contradictions upon the witness stand.

Finally, the facts which will stand the test of truth are rounded out, and the whole situation now stands exposed in a large array of facts, but as we have already pointed out, they are of varying degrees of importance to the case.

They may look very formidable and convincing to the

¹ The case referred to is that of Miss Schaffer, a school teacher, who was murdered at Bedford, Indiana.

client and witnesses, but the lawyer knows that the ruthless knife of the rules of evidence will cut large inroads into that imposing bulk of material. This the untrained party does not figure upon, and explains why the common sense idea of justice differs from the results obtained in the courts. But while the rules of evidence will dictate pretty specifically what facts will not be available, it will not conversely inform the lawyer of what facts he must select out of his material with which to prove his case. His general knowledge of procedure must guide him in this respect, and that too only in a general way. The rules and principles of law which he now proposes to apply to the materials constitute thereby the measuring sticks of value. They separate matter which is material from that which is purely incidental, and follow this up by separating matter which is material into that which is relevant and that which is not relevant, and finally the rules of evidence having finished their work, the principles of procedure take up the matter thus material and relevant, and divide it into that which is crucial, the *sine qua non*, and that which is corroborative and supplementary only. In this way the material has been appraised at its proper value for the trial.

The rules of evidence are so numerous as to constitute an extensive branch of the law within itself, but the principles of procedure which govern the ranking of material directly to the issue in a criminal case, may be summed up as follows:

1. Was there a deed committed as alleged?
2. Was the deed committed under the conditions alleged?
3. Was the party alleged the one who committed the deed?
4. Are the results the same as those alleged?
5. Was the deed excusable or justifiable?

Each of the above propositions being essential to the winning or losing of the case, becomes therefore a standard by

which to test the facts, and thus select and organize them for trial. However, the facts segregated around these points can not be in many cases elicited from witnesses in the same order as the logic of the issues would group them. For instance, neither one of the propositions can be exhaustively treated in the production of evidence before another is taken up. Usually the order of deducing evidence is per unit of witness. For example, all of the evidence upon whatever proposition must be taken from the witness before he is dismissed. It is true that a witness may be recalled, but usually in rebuttal or by way of further explanation of a point already made by the witness, for the rule is to complete the testimony of a given witness in one hearing and to do otherwise is vested in the discretion of the court. Because of this rule, the facts to be put in evidence must not only be estimated according to their bearing upon one or more of these propositions, but also with reference to the most opportune or necessary time during the trial. A fact presented before the proper time, or after it, will lose much of its power, for the facts relating to a given issue should not be separated by wide gaps of other matter, but as nearly as possible joined logically from one witness to another. In short, the question of order presents two problems as follows: First, how to preserve the logical compactness of proof around a particular point by overcoming the scattering of the necessary evidence through a succession of testimonial witness units. To be clear and convincing, the evidence in support of a proposition must be gotten so consecutively together that it not only secures an accumulative effect, but preserves logical continuity in the proof. The method of not eliciting evidence according to subject units, but according to witness units, tends to confuse inextricably the evidence.

Now the method by which such a result may be in a measure obviated is to carefully study and map out in ad-

vance the exact facts in the possession of each witness. This done, a comparative study of the several witness maps will disclose what groups of witnesses should go together and what succession is best in each group. Still another estimation of fact valuation, as determined by order, arises at this juncture from the fact that equivalent testimony from different witnesses is not of equivalent value, since the truthfulness of facts depends upon both the honesty and ability of the witness. This fact complicates the problem very much, but the best plan is to tentatively arrange in succeeding order of strength each witness from the standpoint of general impression regardless of knowledge, and then by comparing this list with the previous list made on the basis of evidence, the most effective selection can be made. Of course, the difficulty frequently occurs that the best evidence and the best witnesses in other respects do not coexist, so that there results a forced choice between a good witness with poor evidence and a poor witness with good evidence upon the same subject-matter, when it may not be advisable to introduce both. And although both be given, the combination is an unfortunate one and of course an insurmountable one. Finally, whatever lack of unity or connection between the parts of the evidence still remains it must be cleared up and bound together in the address to the court or jury.

The second problem of order which determines relative values among facts is how to best time their appearance in the trial from the point of view of their relation to the opponent's case. Where the full significance of the plaintiff's case, together with its crucial evidence, develops early in the trial, the defendant is able to adjust his defenses and attack accordingly, and in many instances the entire theory of the defense has been changed in consequence of some unexpected turn in the plaintiff's case. Thus any solution to this practical problem of strategy calls for considerable power of anticipation. Nor does anticipation here mean imagination

only, but carefully inferred conclusions drawn from a careful study of the opponent's case. An accurate knowledge of what your opponent can do is a pretty good indication of what he may and probably will do. By this means you may successfully push forward or reserve parts of testimony, even for rebuttal purposes, or fuller explanation. Where matter is held in reserve to be later brought out should the court permit on redirect examination, the way needs to be carefully prepared by raising the point in the first hearing, since the rules of evidence rigidly exclude the introduction of new matter upon redirect examination.

Some doubt as to the ethical character of withholding evidence in order to save it from the attack of the opposition is expressed, but it is hard to determine in a case of this kind, whether the delay has been to prevent a sufficient answer on the other side, or to prevent some form of side-stepping by the enemy. As long as avoidance of squarely meeting the issue may be practiced from both sides, and undoubtedly often is, the play to foil against loss, while it may also involve some element of advantage, is not always a discreditable performance. An advocate, at least, is entitled to all such manipulation of evidence as will tend to put his case squarely and fully and at its true value before the judge or jury, but beyond this he has no ethical privileges. So the facts must be weighed with a just appreciation of the part they are capable of playing in the strategy of the trial.

Not only must facts be measured from their relation to the issues to be proved, and not only must they be valued with the stamp of an individual impress upon them, and not only must their collectability from testimonial dispersion be calculated, and not only must their strategic possibilities be appreciated, but facts must also be estimated from the standpoint of their logical provability and their emotional dramatic qualities.

Not all facts yield with equal facility to demonstration. Those which may be identified from the most points of view are most easily proved, for the more the corroboration the more certain the proof. We are speaking now of the usual testimonial proof. It stands to reason therefore that facts which have the element of permanency in them will have for an ordinary law trial, which is in a restricted locality, the greatest possibility of corroboration. Conversely, things which change often and rapidly and materially are the most difficult to prove. It might be next to impossible to prove that a cloud obscured the sun at a particular crossroads at a certain hour of a particular day, while it would be much easier to prove that a house stands upon a given hill, and very easy to establish the fact that a river passes by a town. Sometimes, however, it occurs that the fact most difficult to prove is the all important one. When a fact can not be proved by direct observation, it may often be reached indirectly by circumstantial evidence, for example, witnesses may have observed through some of the senses other facts from which the fact desired may, or must be inferred. Thus a transitory object or thing may have left traces of its presence upon the more permanent factual environment about, and from these signs it may be proven. This method, however, involves testimonial evidence supplemented by the reasoning of the pleader.

So also, along with the element of permanency in a fact, may be added the attribute of conspicuousness, or having such a nature as to attract attention, and as a corollary to this, a location within a human zone. For we must ever remember that all facts for trial purposes must be secured through someone's eyes, ears, skin, mouth or nose. It follows therefore that facts centrally located among these receiving and registering instruments will produce the most records, and hence be the most valuable for proving purposes.

In conclusion, it may be said that indirect inferential proof,

when it involves technical knowledge of the relation of cause and effect among objects, is extremely difficult to establish. To prove a case of poisoning or undue influence, for instance, is sometimes an obdurate task.

Finally, in criminal cases more especially, the dramatic power of facts is an important factor. The feelings are bound to decide the case if logic fails, and many times regardless of logic. Since the emotions exercise such a potent influence over the mind, and since logic is made all the more effective by being supplemented through the proper arousal of feeling, there results every reason why the lawyer should carefully select and organize his facts with this in mind. Facts most intimately associated with the sacred things of life and private interests are usually the most powerfully charged with emotional content. But facts of a pathetic nature are always touchstones to action, and the value of facts, after all, for evidentiary purposes, reposes in their power to effect a movement of the will. If the case be tried before the court the primary road to this effect is to convince the mind of the judge rather than to attempt to arouse feeling, for the court has trained itself by tradition and practice to confine itself to the law and the evidence. However, before a jury, the facts which impress themselves upon the consciousness of the undisciplined human natures found there are generally those which are redolent with the raw sensations of life. Facts which appeal to the gentler and more subdued emotions are the most tenacious and hold their fire the longest. Sulphurous indignation or revenge may burn intensely for a brief time, but fade with astonishing rapidity. The best practice is to work facts which convince, and facts which stimulate feeling together somewhat, but this is the very acme of oratorical art and also has a considerable science behind it.

We have specified five propositions in support or disapproval of which the relevant facts in the case will organize.

It is not assumed that each of these propositions will be of equal importance in the task of winning or disproving the charge. In all probability some of this matter will be admitted by the adverse party. This can be ascertained by the pleadings if properly drawn. The prosecutor will do well then to study the pleadings thoroughly and ascertain the relative stress which will fall upon these general propositions. As a general rule, the burden of proof rests upon the prosecution and this is not merely to emerge at the end of the trial with his proof established, but to begin the action by at least making out a *prima facie* case. Now the minimum requirement in the eye of the law for establishing a *prima facie* case is, at least, to prove the *corpus delicti*, or body of the offense. The exact content of the *corpus delicti* varies with different offenses so that the lawyer must be informed of the elements necessary to the particular charge. In a case of burglary it would be the facts that a dwelling house had been broken into with intent to commit a felony therein, or in a case of murder it would be a combination of the two facts; that there is a dead human being, and, secondly, that the human being was killed. The proof required in support of the *corpus delicti* must be sufficient to dispel a reasonable doubt. Furthermore, it is presumed that this evidence will be presented at the opening of the trial, and where some uncertainty exists the defense will object to the introduction of further evidence on the ground that no *corpus delicti* has been shown. From these considerations it can be seen that where the *corpus delicti* has not been admitted the facts in substantiation of this preliminary step is of supreme importance.

Nor in conclusion does a lawyer cease the process of estimation with that of his own facts, but makes just as careful an analysis of the facts which his opponent will use. In short, many of his own facts will assume a rebuttal value not significant but for the antagonistic fact or

facts. And here a large exercise of what is called the scientific spirit is necessary if opposition facts are to be rated at their true force and value. Many a lawyer loses his case because he stubbornly refuses to see another side. Enthusiasm and confidence are excellent things in an advocate, but not when he is suffering from a legal mental myopia or astigmatism.

Finally, it is well not to confuse the terms fact and truth, for they are not identical. A fact is anything limited by space and time relations, so that a truth may have a factual embodiment and usually does, but a truth is a relation which is valid everywhere and at all times in contrast to the limitations of a fact.

PART TWO

LEGAL BRIEFING

CHAPTER XIII.

PRELIMINARY WORK.

Application of the Law to the Facts.

It was pointed out under a previous chapter¹ on the estimation of the facts that the "factual field" must be reduced to groups of circumstances centering about a number of questions fundamental to any case. Assuming now as a basis for the work of briefing that the advocate has made such an investigation in the most thorough manner, and assuming furthermore that he has a working knowledge and mastery of the various forms of reasoning, he is then ready to approach these facts from the standpoint of legal interpretation and litigation. For it is an obvious situation that neither will facts interpret themselves nor laws apply themselves. The two must be knit together by the courts of law through the joint labor of the advocate and the bench. On the one hand is a vast system of legal concepts, each valid, and law for a given and specific set of facts. Such legally prescribed units of fact are necessarily restricted to a few essentials which are definite and absolute prerequisites.² Moreover, each differs from any other in some sine qui non which makes out its own peculiar nature and service.³ Thus larceny and em-

¹ See ante, page 349 et seq.

² Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340; Chitty's Pl. 255.

³ Cook v. Scott, 1 Cilm. (Ill.) 333; Bliss Code Pl. (3d ed.) § 210.

bezzlement differentiate upon the one specification of whether the person charged was at the moment of the appropriation under or not under a qualified right of control of the property.⁴ Now these concepts of law constitute possible hypotheses under which the given set of facts in the particular case in hand may be classified. In terms of logic they constitute possible major premises, one of which may prove to contain the unit of fact under which the present case may fall. The process, therefore, of bringing together the appropriate legal concept or hypothesis and the set of circumstances in hand, is a preliminary step to any further progress in litigation. It is bringing theory to apply to a concrete case, and it is consequently denominated finding or selecting a "theory of the case". That it is a crucial step to all that follows will appear in a moment, and that it is sometimes a most difficult matter will be evident, when we remember that the concepts of law are many and finely drawn, and with sometimes intricate and subtle distinctions, and oftentimes with divers interpretations under different jurisdictions. Add to this difficulty the further consideration that the actual set of circumstances contain a multitude of details which hang as a fringe upon the facts which will prove vital to the issues and thus tend to conceal them under a maze of divers suggestions and some idea may be gained of the careful analysis and wide grip upon the law necessary to successfully match the theory to the facts. "Nor is it a slight benefit", says Cardinal Newman, "to know what is needed for the proof of a point, what is wanting in a theory, how a theory hangs together, and what will follow if it be admitted".⁵ So in finally determining the theory possible objections to it should be considered. It is said that "in determining the theory of the case Rufus Choate was never satisfied until

⁴ *State v. Fann*, 65 N. Car. 317; *State v. England*, 53 N. Car. 399, 80 Am. Dec. 334; *Raven's Case*, J. Kelyng 24.

⁵ *Elliott's Work of the Advocate*, p. 62n.

he had met every supposition that could be brought against it".⁶

Importance of a Theory of the Case.

The importance of such a preliminary theory is marked. Without it the prosecution is orderless, the defense aimless, and the court without a standard. Unless the plaintiff adopt some definite idea as to the nature of the offense he can not draw his pleadings consistently, nor can he introduce his evidence logically, and finally is unable to effectually argue toward any definite outcome before the court or jury. So also the defendant is at sea and is rendered powerless to strike any blow which will tell. Without a theory to attack, the defense is unable to prepare and anticipate effectively. The combat does not lock horns, and consequently can decide nothing on its merits. The issues can not be drawn because they are dependent upon some theory in course of application, and out of which they spring and may be formulated. Finally, the court has no standard by which to judge the relevancy of the testimony. Without a theory all evidence is alike. Thus the trial may wander from one ground to another and end in a mixture of several diverse, if not contradictory issues. So emphatic and fundamental is the need of this well defined basis that the law will protect the right of the defendant by cloaking him with the right to demand of the plaintiff that he select a theory in advance of the trial upon which he proposes to stand, and will safeguard the demands of justice and a sound record by conferring upon the court the power to compel the litigants to adopt some one ground upon which to try the issues of the case.⁷ Without such unity and consistency in the trial the

⁶ Elliott's Work of the Advocate, v. 59.

⁷ Aetna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. 194; Kewaunee v. Decker, 30 Wis. 624.

issues can not be clearly made to stand as *res judicata*.⁸ Thus a simple instance would be that where an action either in tort or upon a contract would lie, the adoption of one or the other is necessary, for the two are unlike in essentials and unlike in the measure of damages, so that an intermingling of the elements of both would lead to an illegal as well as illogical confusion. Nor does the restriction cease with the selection of a theory. It must be thereafter adhered to, not only in all of the succeeding pleadings and during the course of the trial, but can not be abandoned on an appeal.⁹ If through ignorance, mistake or inadvertence the ground first chosen be dropped and the case shifted to some other ground it may amount to reversible error.

Steps in Determining the Theory of the Case.

The initial stage toward fitting the proper law to the facts results in a theory, as already explained, by the use of the principle of hypothesis as a working tool to harmonize law and facts. This requires a double hypothesis, or two hypotheses, if we prefer to put it so, in the assumption of what has actually taken place and the correlate to this, a provisional selection of what law principles will fit such an assumption. In the more complicated cases, and especially in criminal practice, an estimate of the facts may disclose a disorganized mass of circumstances where fact will not touch upon fact in unbroken sequence, where causes are without distinguishable effects and effects derived of no ascertained causes and to which no law will apply upon the "data given". Now it becomes necessary for presumption, under the form

⁸ *Marshall v. Otto*, 59 Fed. 249; *Johnson-Brinkman Comm. v. Missouri Pac. R. Co.*, 126 Mo. 344, 28 S. W. 870.

⁹ *Keedy v. Long*, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; *Crossman v. Universal Rubber Co.*, 131 N. Y. 636, 30 N. E. 225; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. 803; *Crook v. First Nat. Bank*, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. 17.

of a reasonable conjecture, to supply for testing out and discovering the complete truth as it happened, an hypothesis of what really occurred. These hypotheses of fact and law are, at first, but a tentative means to arrive at the most probable, if not certain, solution of the case. The two provisional theories are tested both ways for accuracy as follows:

Beginning with a theory of what occurred, drawn from what the facts in hand seem most reasonably to suggest, the advocate consults the system of law for a theory of categorized offense, which in turn seems to match the hypothesis of fact. Suppose, as did Webster in the Knapp murder trial, that the presumption of a conspiracy is raised to explain the circumstances. At once the law covering the question of criminal conspiracy is suggested as the most likely field to find the theory of the case. Adopting for the time such an hypothesis, the elements requisite to this theory are now brought to bear upon the actual facts. It may now be discovered that the facts do not harmonize with the legal concept of criminal conspiracy. If not, some other field must be considered. However, a scrutiny of the facts from this point of view may suggest a modified theory of what took place. Again the law is consulted to test the sufficiency of the data from the modified conjecture. Thus back and forth, from theories of what might have transpired, to corresponding legal principles, the possibilities, probabilities, moral certainty or absolute certainty may be evolved. The process will end either in unearthing new facts to substantiate the theory of fact or of rendering plain the one most harmonious with the obtainable evidence. The advocate will then have a conclusive case or he will have a theory of fact and law the most convincing under the circumstances.

It is obvious that such a process calls for a high order of constructive or inventive imagination, but it is an imagination limited and controlled by a logical weighing of probabilities

and a fine application of the value of details. Of course the use of the provisional hypotheses to test and correct each other until complete alignment ensues, will vary with the completeness of the facts known. Where the facts are all known the task is simplified to finding a theory of law covering the case, but where the factual side is a question also of probability, then both sides must be made to interact and mediate each other until the facts which are known are not in conflict, and highly corroborate the hypothesis of fact ultimately assumed and the theory of the case adopted to fit this hypothesis. First of all then the theory of the case must be selected to match either the "complete given facts", or to match the most highly reasonable hypothesis of the complete facts as drawn and based upon the ascertained data.¹⁰

The first step having resulted in a classification of the matter under the head of contract, tort or crime, may disclose the fact that more than one legal ground of action exists, to wit: there may be both a contract and a tort, or more than one kind of contract, or more than one species of tort, or possibly two distinct crimes, or again both a tort and a crime.¹¹ In some of these the selection of the one will bar an action upon the other ground, while in others the one is no bar to an action upon the second. It is clear therefore that the problem of selecting a theory is not complete with finding one that is legal and will work, but from among two or more that will succeed, to appropriate that which will prove most efficacious as a remedy. Thus the remedial adequacy of different correct actions form a second step in the problem of selecting a theory of the case.¹²

A distinction has been made in warfare between maneu-

¹⁰ Elliott's Work of the Advocate, ch. 3; Pom. Code Rem. (3d ed.) §§ 558-567.

¹¹ Cooley on Torts (3d ed.) 155-166.

¹² Brown v. Chicago, M. & St. P. R. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41.

vering and strategy, the former constituting skill in the art of moving the forces to the assault, while the latter consists in a prearranged plan of procedure which formulates the basis for the maneuver. The distinction applies also to a legal battle. It is the part of strategy for the advocate to estimate carefully the advantages and disadvantages to his client's interests involved in the different characteristics of the several remedies which are available. Numerous questions of legal nicety are raised by this strategic investigation. We will here review a number of determining conditions, but the advocate should very thoroughly cover the field since the correct solution of this problem is one of the most practical phases of the case.

Naturally the first consideration is which one of the theories has he the evidence in hand to prove? It is obvious that a remedy, however efficacious in results, is out of the question if there is not sufficient evidence to establish it. For example, it may be doubtful whether an express contract could be proved, but there is abundant evidence to support an implied contract. He may proceed upon either theory, but of course selects the latter.¹³

Secondly, bearing in mind the status of the evidence as to amount and quality, it may be that an action at law or in equity may be brought and consequently the less formal methods employed in equitable proceedings relating to the introduction of evidence, may be a determining factor, or it may be that a trial before a judge rather than a jury because of the emotional or technical nature of the evidence may be desirable, or the converse be more likely to result favorably. He brings his action accordingly.¹⁴

¹³ *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 553; *Long v. Doxey*, 50 Ind. 385; *Richardson v. Coffman*, 87 Iowa 121, 54 N. W. 356; *Keedy v. Long*, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; *Salisbury v. Howe*, 87 N. Y. 128; *Knutson v. Knapp*, 35 Wis. 86.

¹⁴ *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. 294.

Again, the defendant may be an infant, in which case the plea of disability, if the action be on contract, might be successfully interposed, but no such a defense would be available in an action in tort.¹⁵

Sometimes also the nonsurvivability of some actions becomes a conclusive factor in the election, since personal torts do not survive, while contracts, except those for services of a personal nature, do.¹⁶

Or one action may be barred by the statute of limitations while another is not yet so affected, or in answer to one action a set-off, recoupment, adverse claim or exemption may be pleaded, while under others no such advantage may be secured.¹⁷

Similarly by ingenuity in the selection of a remedy the statute of frauds may be sometimes avoided, or the use of the general issue may be prevented to the defense, or the burden of proof be shifted upon the opposite party, or an interlocutory judgment be escaped.¹⁸

Still further, it may occur that one action will require title while another may be based merely upon possession by the plaintiff, that one may be joined with other causes of action while another can not, or that in one certain requisites of the remedy, such as arrest, may be necessary while such conditions are absent in others.¹⁹

Finally, as in the case of conversion, the condition of the converted property may decide the form of the action, for if the value of the property has depreciated it may be more

¹⁵ Andrews Stephen's Pleading (2d ed.) p. 91, § 51.

¹⁶ Union Pac. R. Co. v. Kelley, 4 Colo. App. 325, 35 Pac. 923; Pierson v. Morgan, 52 Hun (N. Y.) 511, 4 N. Y. S. 898, 17 Civ. Proc. 124, 23 N. Y. St. 382 (affd. 121 N. Y. 705, 24 N. E. 1100); Collins v. East Tenn., &c., R. Co., 9 Heisk. (Tenn.) 841.

¹⁷ Carrol v. Green, 92 U. S. 509, 23 L. ed. 738; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782.

¹⁸ Haskins v. Alcott, 13 Ohio St. 210.

¹⁹ Maybee v. Moore, 90 Mo. 340, 2 S. W. 471; Cruger v. Cropsey, 3 Johns (N. Y.) 242; Gulley v. Macy, 84 N. Car. 434; Grimstead v. Marlow, 4 T. R. 719; 1 Cooley's Bl. (4th ed.) 162.

advantageous to sue for damages rather than for a recovery of the property, or vice versa, and further in cases of a tort arising out of a contract, it frequently happens that the measure of damages for the former may take into consideration various considerations to augment the claim which would not be allowable in an action upon the contract.²⁰

Now and then an action is brought upon the theory of a quasi contract when it should have been brought upon an express or implied contract, and not infrequently an action is begun in equity, only to be set aside because it should have been brought as an action at law. These are instances of mistakes of law and are serious blunders for a lawyer to commit. A few cases are on record where an action which was brought at law, although in subject-matter and remedy calling for equitable treatment, were on the court's own motion and power of discretion adjudicated as actions in equity, but the cases of such rectification are rare.

In some jurisdictions the liberty of setting up the same causes of action under the different theories advanced in the common counts, because of a lack of information of the real facts in the possession of the plaintiff, makes it of importance for the advocate to prepare his case along all of these lines, and a few cases under circumstances of especial handicap to the plaintiff have allowed other theories than the common counts to be pleaded simultaneously until the true facts should disclose which theory must be followed. This, however, is only a case of deferred election and in no sense violates the rule that but one theory must govern the case.²¹

²⁰ *White v. Murtland*, 71 Ill. 280, 52 Am. Rep. 100; *Harms v. Stier*, 51 Ill. App. 234; *Davis v. Easley*, 13 Ill. 192; *Blagge v. Ilsley*, 127 Mass. 191, 34 Am. Rep. 361; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. 803; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; *Bailey v. Chicago, M. & St. P. R. Co.*, 3 S. Dak. 531, 54 N. W. 596, 19 L. R. A. 653.

²¹ *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497; *Owens v. Geiger*, 2 Mo. 39, 22 Am. Dec. 435; *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542, *Seld. Notes* 32; *Cox v. Providence Gas Co.*, 17 R.

Not only must the conditions incidental or essential to the various remedies afforded by the different kinds of action be compared in the selection of the right species of an action to bring, but having discovered the most advantageous species of action, the proper theory of the case is not yet perfected. Within this most appropriate species there may be subdetails which will produce more than one theory under this species, one of which may prove successful and another disastrous. Thus, suppose that an action be brought by a brakeman against a railroad company for damages sustained from personal injuries inflicted in a railway wreck. The theory has so far been construed to be a tort for a violation of the obligation to secure the proper degree of care. But when negligence was responsible for the accident, two additions to the partly perfected theory may now be appropriated—one that the fault was that of the engineer or some other agent of the road, and the other that the equipment was deficient. We are supposing that the facts will sustain either ground. However, if the former be selected it will involve the defense of the “fellow servant rule”, while if the latter, no such opposition is possible. Or if compelled to admit the negligence of the engineer he might still avert the “fellow servant rule” by advancing the theory that the engineer as a part of the equipment of the road was selected by the company without a due regard for his competency.

Or again the theory may favor a breach of contract rather than a case of fraud, but the further element of doubt is whether the action will lie more successfully upon the ground of breach of the main contract or breach of warranty. Again, an action for damages for trespass to land may succeed if brought in one county, but fail if brought in another, while an action upon the same set of facts may be brought in one court, but not in another, where their jurisdiction is

not concurrent. So also this question of detail would arise in an action brought to recover back money paid on a contract with a corporation, as to whether the theory of the case should hold the contract to be *malum in se*, *malum prohibitum*, or simply *ultra vires*. For in the former the court would refuse to grant a remedy, in the second the question of statute would be imperative, and in the latter the matter of notice might be determinate. In such a manner innumerable details affecting the various species of action are the final cruxes upon which cases turn, and no theory is complete which stops with the selection of not only a possible, but the best species of action, but must add to this such particularity of detail as will insure a successful outcome.

The Use of Hypotheses.

The theory of the case most likely to prove successful, having now been evolved by a process of comparing fact and law through the use of an hypothesis for each where either one presented incompleteness and uncertainty of data, first by an examination of the remedial advantages and disadvantages of different species of action, and secondly, by applying a similar process to the details associated with the theory so far advanced, the advocate is then ready to utilize this completed theory as a basis for defining the issues involved and the best method of substantiating them.

But before proceeding to this question it is important that the relation which hypothesis bears to the theory of the case be not confused in the lawyer's mind. A definition of each may be of some assistance at this point. An hypothesis is the assumption of the truth or existence of a thing in order to infer from such a condition the truth or existence of something else. It is therefore a means or instrumentality for proving or establishing something different from itself. This something different may be wholly external to the data

of the hypothesis, or may be a larger thing of which the data of the hypothesis is a part. An hypothesis can not be used with which to prove itself alone, for this would be an argument in a circle, since the hypothesis assumes what would be up for demonstration, and a thing can not be directly proved by assuming it, for the effect amounts to a contradiction or nullity, a form without substance. On the contrary, the theory of the case is something which the advocate sets before himself, his adversary and the court to prove. He does not assume it as a whole in any way, although he may assume this or that part of the data in order to prove the logical and factual harmony of the whole theory as an explanation of the circumstances. Thus he may assume a motive, or an intent, or a plan, or a conspiracy, or a situation, a part of the data which is unknown in order to test the consistency of the whole body of fact if such a part were true—and the great test of truth is consistency among facts. A theory of the case then is that set of facts relating to a cause of action which the advocate believes to be true, and which are capable of being brought and proved to lie within the provision and determination of a given principle or principles of law. It then covers a set of facts, a principle of law, and the adjustment of the one to the other. All these phases must be proved if not admitted by the court and opposition. Now as a means both of proposing a theory which is legal and which he can prove, and to prove the same after it has been evolved and selected, the advocate uses as such means of so doing the hypothesis. Hypothesis and theory of the case then stand for argumentative and practical purposes in the relation of means to end.

When the case is first put into the hands of the advocate he occupies the standpoint of an investigator only, he does not know the facts; he can not therefore know the law which will be applicable, and hence the theory of the case is a solution to be evolved. Now the only way to develop the

factual side of such theory is to frame an hypothesis of what occurred from the scattered data which a cursory examination will contribute of what occurred. With this as a basis, he projects from his general knowledge of the law an hypothesis of what is applicable. He then investigates the limitations and requisites of this tentative hypothesis of law, and with this definite information he returns and applies them to the hypothesis of fact already assumed. Some facts are disclosed to be contradictory, some needed are absent, and other new facts are acquired. The hypothesis of fact is now modified to harmonize with the added information. Such change, however, requires some modification of the hypothesis of law also, together with a new investigation of its limitations and requisites. Thus stage by stage the two hypotheses are played over against each other with the result that eventually the hypothesis of law and fact harmonize. The means has now developed the field of both law and fact from the unknown and speculative and probable, to either the completely known or the morally certain. This data related into a whole constitutes now the theory of the case. When this point is reached the hypotheses have practically vanished and are of no longer service in this capacity.

Not always, however, will the hypotheses justify themselves by a complete case of known fact, nor in all cases an incontestable application of law. The trial will then accordingly concentrate upon such issues of fact or issues of law, the former going before a jury while the latter will be argued before the court. Many times the issues are of mixed law and fact. Particularly in cases which hang upon circumstantial evidence, or cases in which a novel or new application of law is involved, do such situations arise. The former are numerous in criminal practice. Here ensues a second use of the hypothesis as a method of argument. In order to prove the consistency of the theory selected as a whole, and thereby prove its correctness, it often becomes

necessary to assume or hypothesize this or that fact, motive, intent, plan or any other of a score of circumstances. Such hypothesis of a detail or part renders the whole a complete unity, and enables the theory proposed to explain all the material facts, and it is the sole method of proof by circumstantial evidence, or of refutation, to show that the theory proposed explains or does not fully explain the facts. The presumption of experience in law, as well as elsewhere, is that only one explanation, and that one embodying the truth, can and will successfully explain all the facts. The law of nature is that consistency among facts and their truthfulness are practically synonymous.

However, this general assumption of experience and deduction must be accepted with great caution, for where the facts are few or not well known some startling exceptions occur. A number of examples are on record where an almost incontestable explanation of facts has afterwards turned out to be false. For this reason every possible theory or hypothesis which will explain the circumstances should be weighed. Thus, in a complicated case, the advocate will prove his skill and ability to devise and discover hypotheses of missing links and there may be a number in the same case. Such hypotheses thus become issues in proving the correctness or falseness of the data in hand, and some of the most celebrated advocates in the world have been most successful in their ability to construct and support these hypotheses. The clearest refutation of an hypothesis of course is a counter-hypothesis equally probable and reasonable. And this is the key to this form of reasoning, the ingenuity to discover hypotheses which are natural and reasonable. A far-fetched speculation is often worse than none and a failure to show a reasonable credibility reveals a case founded too much upon pure speculation. As already pointed out, the imagination necessary to piece out fragmentary circumstances must be one based upon a strong appreciation of the difference be-

tween sheer possibility, slight probability, strong probability and moral certainty. The jury will seldom convict on less assurance than one of moral certainty, and in fact the instruction by the court will usually define very carefully what tests of probity the jury must apply. This test is either the preponderance of the evidence or the exclusion of a reasonable doubt. But the test is not always self-evident in application, and hence the court usually proceeds to explain more fully just what is meant by preponderance of the evidence or a reasonable doubt. The latter especially has given considerable trouble and has been expounded in numerous ways. From Sackett's Instructions to Juries may be found the following as illustration:

"The court instructs the jury . . . and it is the invariable rule of law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and as can not, upon any reasonable theory, be true and the party charged be innocent; and in this case, if all the facts and circumstances relied upon by the people to secure conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit the defendant."²²

Again: "In order that a jury may be warranted in finding a defendant guilty upon circumstantial evidence, all the facts and circumstances necessary to establish the conclusion of guilt must be proved beyond reasonable doubt, all such facts and circumstances must be consistent with each other and with the conclusion sought to be established, which is that the person on trial committed the crime as charged. All such facts and circumstances must be inconsistent with any reasonable theory of the innocence of the defendant, and such facts and circumstances, taken all together, must be of such conclusive and satisfactory nature as to produce in the

²² *Marzen v. People*, 173 Ill. 43, 60 N. E. 249.

minds of the jurors a reasonable and moral certainty that the person on trial, and not some other person, committed the offense charged."²³

Again: "Crime may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendants and inconsistent with any reasonable theory of defendant's innocence."²⁴

Again: The jury are instructed that in cases of circumstantial evidence "the jury must not only be satisfied beyond a reasonable doubt that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is the guilty person. If there is any one single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt and the jury should acquit the defendant".²⁵

Again: "The court instructs the jury that before they can convict the defendant on circumstantial evidence alone, every material fact necessary to show the defendant's guilt must be proven beyond a reasonable doubt, and that if any material fact necessary in this case to show the defendant guilty as charged in the indictment has not been proven to the exclusion of a reasonable doubt, you should acquit this defendant."²⁶

Again: "Absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances; it is sufficient if they, with all the other evidence, produce moral certainty to the exclusion of every reasonable doubt."²⁷

²³ *Galloway v. State*, 44 Tex. Cr. 230, 70 S. W. 211.

²⁴ *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194.

²⁵ *Horn v. State*, 12 Wyo. 80, 73 Pac. 705.

²⁶ *Alderson v. Commonwealth*, 74 S. W. 679, 25 Ky. L. 32.

²⁷ *Jenkins v. State*, 35 Fla. 789, 18 So. 182, 48 Am. St. 267. See also *Myers v. State*, 43 Fla. 500, 31 So. 275.

Again: "You are not to fancy situations and circumstances which do not appear in evidence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances."²⁸

Again: "The evidence in this case is what is known as 'circumstantial'. . . . And I will say to you that the evidence which has been received in this case is legal and competent, and if it is, in your mind, of such a character as to exclude every reasonable theory or hypothesis other than that of the defendant's guilt, beyond a reasonable doubt, then and in that event it should be given the same weight by you as would direct evidence of the fact alleged. . . . Circumstantial evidence, when competent, and when complete and satisfying to your minds, as has been charged, is entitled to the same weight that direct evidence is."²⁹

Again: An inference must be founded on a fact legally proved, and on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men."³⁰

Again: The court refused to instruct that "while circumstantial evidence is legal and proper evidence in criminal cases, yet no inferences or presumptions should be indulged in by a jury that do not, in their minds, necessarily arise from the circumstances proved."³¹

²⁸ *Smith v. State*, 61 Nebr. 296, 85 N. W. 49.

²⁹ *State v. Coleman*, 17 S. Dak. 594, 98 N. W. 175.

³⁰ *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017.

³¹ *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. 147.

CHAPTER XIV.

DEALING WITH THE ISSUES.

Finding the Issues.

The meaning of the term "issue" in law requires special attention, for it was the early demand of the common law that a dispute must first be brought to an issue before trial which lay the foundation for the splendid system of pleading that has distinguished our courts.¹ Numerous rules were devised to lead to the production of an issue which would be definite and single. With such an aim in view an issue was defined to be that thing that was alleged on one side and denied on the other.² This formula proved to be a very serviceable test to discover just what was disputed matter. The purpose was plainly to isolate such matter as would require evidence to settle. There was no advantage in discussing materials in which both parties might agree and concur. But it is plain that such a restricted use of the term "issue" does not cover what it has later come to signify. In fact, there is a more general meaning of the term which signifies any important point upon which the case may turn.

¹ Winchester Repeating Arms Co. v. New York, &c., R. Co., 7 Yale L. J. 245; Romeyn v. Sickles, 108 N. Y. 650, 15 N. E. 698 (for general use of term).

(a) Code Rule: Aetna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. 462; Witascheck v. Glass, 46 Mo. App. 209.

(b) Common Law: Wilson v. Johnson (N. J.) 29 Atl. 419; Toledo, &c., R. Co. v. McLaughlin, 63 Ill. 389; Longyear v. Minnesota Lumber Co., 108 Mich. 645, 66 N. W. 567; Smith v. Rumsey, 33 Mich. 183.

(c) Equity: Union Pac. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983; Smith v. Missouri Pac. R. Co., 56 Fed. 458; Ogden v. Moore, 95 Mich. 290, 54 N. W. 899; Connecticut Fire Ins. Co. v. Monroe Circuit Judge, 77 Mich. 231, 43 N. W. 871.

² Avon Mfg. Co. v. Andrews, 30 Conn. 476.

This is an argumentative use of the term and is widely contrasted with the first. The former was a name for the thing that must be litigated, which was not itself evidence, but an allegation to be proved. The second, on the contrary, is evidence of the former, but also to be proved. The second, therefore, becomes a subordinate support of the first, but need not appear in definite form on the pleadings. Issues may therefore be said to fall into two classes: those to be litigated, and hence predetermined by the pleadings; and those subordinate points which are crucial to the proof of the former, and which are developed during the trial and enunciated in the argument.

But again, the first class is divisible into those which relate to contention over questions of law, and those which relate to disputes over facts of life other than those of law.³ Both are defined and raised by the pleadings (including demurrers and motions), but the former are questions to be argued and settled by the court, and the latter by the jury. Sometimes it occurs that issues combine both orders of fact and are consequently called questions of mixed law and fact. In these cases they are sometimes settled by the court, sometimes by jury and again by a division of labor.

From the point of view of argumentation an issue must be either primary or secondary, that is, it must either be the point to be proved as the end and aim of the argument, or it must be a point to be employed as evidence. In any whole and complete unit of argument therefore there can be but one primary issue, although there may be numerous secondary ones. Considering a trial as one unit of argument inasmuch as it deals with one cause of action it follows that there will be but one primary issue supported by one or more secondary issues. However, secondary issues may not all be co-ordinate, but may in turn rest upon other and more subordinate issues. Secondary issues may consequently be in-

³ Andrew's American Law (2d ed.) p. 1475, § 768.

intermediate or ultimate, that is, they may lie at the very bottom of the chain of argument and evidence or in some midway stage between the first, or primary issue toward which all points and into which all converge, and that issue or issues below which no further grounds are posited.

As already indicated, some of these issues must be settled by evidence adduced pro and con, while others may not be directly established, but are made valid either by the admission of both parties or from the validation and proof of the issues upon which they rest. From these observations it is manifest that a case at law, in most instances, involves a more or less complex system of issues which must be carefully worked out in advance and distinguished in their relative importance and place in the argument. Therefore let us now proceed to the question of ascertaining these issues.

Method of Finding the Issues.

With the theory of the case definitely determined upon the advocate draws up his pleadings to conform thereto. As already discussed elsewhere⁴ the declaration, complaint or indictment, as the case may be, must expressly allege the fact side of the theory of the case as the logical minor premise so clearly and precisely that the law side of the theory of the case will appear as the major premise of the argument by necessary implication. But it requires both sides to determine what will be the live issues. Not until the answer is filed does the plaintiff know legally what attitude the defense will take. To be sure, he knows what in probability will be the main contention, for his general investigation of the facts and the law will usually reveal as much, but he can not be sure of the details. Only when the pleadings are all on record is he certain of the battle ground. And even then certainty will largely depend upon whether it be a civil

⁴ See ante, page 45 et seq.

or a criminal action, and whether the pleadings are in conformity with the common law or the code system of pleading.

If it be a criminal action under either system, the general issue of "not guilty" furnishes the prosecution no certainty as to what particular defense will be entered. However, he knows one thing definitely, that he will have to prove each and every material allegation in the information or indictment beyond a reasonable doubt. Besides these he may be compelled to rebut the plea of justification or excuse. On the other hand, if it be a civil action under the common law, the final pleadings will reveal whether there be more than one issue, and whether they exist in a primary allegation or are disclosed in a subsequent pleading or are contained in both. But if it be a civil action under the code system where inconsistent defenses are permissible, he is unable from the pleadings to know upon which the actual defense will be made.⁵ The only safe method is to prepare for both. Nevertheless, the pleadings have served to eliminate questions of law, and hence only questions of fact and mixed law and fact remain. The demurrer, if there has been any, has eliminated the fallacy of four terms, or of an ambiguous middle term, and has caused by process of amendment the two propositions of law and fact which constitute the backbone of the theory of the case to actually meet, since the rules of correct deduction require a common ground—an identical middle term or concept.

Yet the pleadings constitute the chart of record and the ultimate authority as to the issues to be settled. When therefore it is finished the time has come to consult its provisions relating to the precise issues.

These issues will inevitably, with the exceptions noted, be contained either expressly or by implication within the re-

⁵ Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. 586; Auburn & O. Canal Co. v. Leitch, 4 Denio (N. Y.) 65, Ames Cases 31; Seattle Nat. Bank v. Carter, 13 Wash. 281, 43 Pac. 381, 48 L. R. A. 177.

siduum of material found within the pleadings after all of the admitted matter is withdrawn. All those issues which are settled in advance upon this record by admission are therefore removed from contest during the trial. And conversely, with the exceptions noted, only those issues which are embodied within the pleadings, expressly or by implication, and not admitted therein, can be raised for adjudication during the trial.⁶ It must not be inferred, however, that issues which are admitted have no bearing upon the final decision, but merely that their value is determined without any recourse to evidence. All the material issues are factors in the adjudication of the primary issue or cause of action.

First of all, from the text of the pleadings the issues must be extricated from evidentiary matter and immaterial matter which envelops the case. And in order to do this each pleading in succession must be consulted, for the purpose of successive pleadings, the primary issue or cause of action having been stated by implication, is to work out by descending degrees the subissues upon which the former rests, until questions of pure detail and fact are reached.⁷ Each pleading which contains new matter will at least propose one issue, while each pleading denied will conclusively confirm the existence of one.

And at this point it is essential that the nature of an issue in law be well understood. It is a maxim of law that there can be no right of action where there is not a legal wrong committed. This does not include an injury, however real, which is justifiable or excusable on legal grounds. It does not necessarily include a moral wrong, but it must be an act made wrong by law. Now it follows that any act which

⁶ *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464; *Gage v. Ewing*, 107 Ill. 11; *Jacobson v. Miller*, 41 Mich. 90, 1 N. W. 1013; *Munday v. Vail*, 34 N. J. L. 418; *Borkenhagen v. Paschen*, 72 Wis. 272, 39 N. W. 774; *Vanfleet on Collateral Attack*, § 749 et seq.

⁷ *Kewaunee v. Decker*, 30 Wis. 624, 10 Harv. L. Rev. 458.

raises a right of action gives, by virtue of there being a remedy provided by law for every right of action, a cause of action. So that any proper theory of the case must organize around a cause of action as the primary thing to be charged and to be proved. A cause of action therefore is always an issue, and the cause of action alleged in the first pleading is always the primary issue in the case, to which all other issues will have a supporting or resisting relation. The final decision of the case will therefore be on the validity or invalidity of this primary issue.

But while every cause of action is, at center, an issue it does not at all follow that the reverse is true, that is, that an issue is always a cause of action, for an issue is only a proposition alleged by one side and denied by the other which will turn the outcome of the case to one side or the other. If it is a thing which the law in advance has proclaimed to be determinative of such a cause of action it will be an issue which must be proved or admitted to any decision of the case, but if it be a thing that logically only is vital to the proof it may or may not be made an issue in the pleadings, whether admitted, denied or ignored. Generally speaking, the use of the term "issue" in connection with pleading is held to be a proposition alleged on one side and denied by the other, and thus is subject to settlement only by the introduction of evidence. But an issue may have a more general significance to refer to a subordinate detail or fact which, if proved, on account of its logical relation to the primary issue, will determine the case or be strongly determinative of the case. The latter species of issues are generally the ones upon which the upper issues stand or fall and which are seldom or never perhaps causes of action. Thus as material to enter into the final determination of the primary issue and cause of action, anything either by presumption, by admission or which is denied, but upon which hangs the decision of the case is an issue, whatever be its

form, or wherever it arises legally during the litigation; yet in a more restricted sense the reducing to an issue by the rules of pleading refers only to discovering that issue or issues upon which evidence must be adduced to settle. The two uses should lead to no confusion whatever, the former being merely a more expansive term and including the ground covered by the technical use.

Issues should therefore be classified by the advocate for purposes of briefing, trial and argument upon the basis of whether they must be supported directly by evidence and argued, or whether they are issues which need only to be proved by logical connection with the former; or utilizable in argument through admission or legal provision; or whether they form only intermediary links or steps between the first and final issues.

Although it may seem at first thought to be a contradiction to say that an issue need not be argued, yet from a practical point of view there are two varieties of such issues. Those which are admitted to be true in the pleadings, and which therefore may be used without argument before the court, and those which are so general as to rest upon sub-issues and whose proof will follow merely from the successful demonstration of such subissues. Of course it may be contended that they are in this way indirectly argued, and in the final summary, a logical effect upon them is often emphasized, but for practical purposes the issues in the case are generally regarded to be those which must be directly, not indirectly, supported by the evidence. Logically, nothing is more truthful or better proved than the truthfulness and truth of its foundation, and hence the more general issue or issues will generally be found to rest upon subfacts which will at once become the battle line of the trial.

The skill and ability of the advocate to so analyze the primary issue as to reduce its provability to the fewest sub-issues will not only simplify the case, but render it capable

of successful substantiation by evidence. For evidence comes in a form of concrete details and not abstract generalities, so that the roots upon which the general issues must stand or fall must be traced down to the fewest possible propositions and into the form of the most precise details which are at the same time essential, and are affirmed by the one side and denied by the other. Naturally cases differ widely in the depth of the substratum upon which the theory of the case rests and no rule can be given to determine this matter. Nothing but analytical ability and experience will solve this practical difficulty.

However the paramount and most general issue is logically the proposition alleged in the complaint that the defendant has committed some legal offense. And the law prescribes that the burden of proving this charge can not be shifted throughout the trial. The plaintiff is under legal obligations to prove the case as alleged. Burden of proof is manifestly here used with reference to the trial as a whole, and especially with reference to the status of the proof at the close. As to how much evidence will be necessary to satisfy this burden will depend upon the particular circumstances. It may be only necessary to make out a *prima facie* case to win if no defense is set up, but if there is it will be measured by the strength of such defense, or by an amount of evidence sufficient to exclude a reasonable doubt. Otherwise a preponderance of evidence will answer the purpose.⁸

But as already pointed out, the above allegation is a legal formulation of the case as a whole and is a concept of law containing usually a number of essential elements. These elements are necessarily subissues, some of which may have been admitted, and others denied, or all denied. The general issue will then be proved only by introducing evidence to

⁸ *Stratton v. Central City Horse R. Co.*, 95 Ill. 25; *Beardstown v. Virginia*, 76 Ill. 34; *Gannon v. Ruffin*, 151 Mass. 204, 24 N. E. 37; *Burrill Circumstantial Evidence*, p. 81.

substantiate each of these contested subsidiary elements. The proponent will therefore prove the first, but both argue and prove the second class of issues. Yet the process may not be so simple as this. The theory of the case may be a legal principle of so general a character as to be made up of several less general principles of law, and this is often the case. Such subconcepts of law are all in turn less general issues to be proved, but they are also general and can not be proved directly any more than could the main issue. These concepts in turn must be analyzed for the essential elements they contain. If there be factual essentials rather than other concepts the bottom is being approached. Or again, some of these facts may be admitted, and others denied, or all denied. Those denied constitute the issues which must now not only be proved, but argued as well. In this case both the first and second class of issues are above the groundwork of detail and fact and can be proved only. Again in turn the second class of concepts may also contain subconcepts, and so on, the analysis must proceed until the field of contended facts is reached which will disclose the final ultimate issues of fact to be proved by argument and evidence.

Finally, while it is true that the pleadings constitute the chart of record as to what are the issues in the case, it must be remembered that the rules of good pleading prohibit the pleading of evidence on the one hand and conclusions of law upon the other. Between these two extremes the rule but vaguely expresses that the pleading should be limited to the *ultimate facts*.⁹ Now the meaning of this phrase seems to be that the most general concepts, principles or conclusions of law, whatever be their appellation, should not be pleaded, for the pleading should allege a minor set of facts to come under the general principle, but the general principle only by implication. Yet the phrase *ultimate facts* would include and actually demand that any necessary subconcepts or subcon-

⁹ *Kewaunee v. Decker*, 30 Wis. 624.

clusions of law, which are elements of the general concept or rule, should be pleaded and should not be omitted, alleging in substitution the factual content of such subconcepts. Thus in an action upon a contract it would be wrong to allege that A and B contracted together, because this is the very effect of their relation which is in dispute and is the main conclusion of law conceived by the theory of the case, while it would be equally erroneous to allege that A said thus and so and B thus and so, for this would amount in such instance to pleading evidence; but the *ultimate facts* which would strike a middle ground would be alleged by affirming that A made such and such an offer, and B accepted the same, etc., which declaration would allege a set of subconcepts that are the essentials constituting the primary concepts. The significance of this is, however, that from this pleading some of the details of conduct which in turn are the legal elements of offer and acceptance and issues in the case, are expressed only indirectly in the pleadings by implication, so that the pleadings can not be relied upon to always indicate all of the issues expressly. Thus where the primary issue of law and the final issue, or issues of fact, are separated by intermediary links the law provides that the pleadings allege expressly neither the one nor the other, but the *ultimate facts*, which in such a case are the issues next in order below the primary issue itself, holding that the issue above is a conclusion of law and the issues below are evidentiary. We may now formulate and summarize more distinctly the different orders of issues in their relation to the trial and argument, and the logical reasons therefor.

Classification of Issues.

On account of a greater liberality in the rules of pleading than existed under the common law especial attention to classifying the issues must be given in the pleadings to dis-

cover whether more than one cause of action is included therein. Sometimes to prevent circuity of action or to economize money, time or effort, some causes of action having an affinity for each other are permitted to be brought together. This implies, however, that the different causes are not to be fused nor commingled, but merely tried during the same trial. The issues involved in one are in no sense issues to others, and the rules require that the separate causes be alleged in separate and distinct paragraphs.¹⁰

The presence of these distinct causes of action having been ascertained, each must be treated as a wholly separate case, their only point of contact being an artificial one of being tried during the same trial, but each culminating in a decision upon its merits alone and quite independently of the fate of the others.

Still another liberality in pleading dating back into early history is that of pleading one cause of action for a final settlement, but of doing so by pleading a number of forms of action from which the plaintiff may elect one upon which to stand when the evidence shall have disclosed which is the most appropriate, or upon which the evidence will support a favorable decision.¹¹ In this case there are not separate primary issues co-ordinate to each other, and calling for as many different decisions, but merely a number of primary issues alleged as possible candidates to fit one cause of action which the facts will later disclose and support. These are known as the common counts, and until the trial is under way sufficiently to disclose the trend of the evidence the primary issue which will eventuate in a decision can not at least theoretically be distinguished from the others. Prac-

¹⁰ *Bell v. Brown*, 22 Cal. 671; *Curtiss v. Martin*, 20 Ill. 557-571; *Montague v. Boston, &c., Iron Works*, 97 Mass. 502.

¹¹ *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086; *Baltzell v. Nosler*, 1 Iowa 588, 63 Am. Dec. 466; *Solomon v. Vinson*, 31 Minn. 205, 17 N. W. 340; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737.

tically speaking, the advocate generally knows which will turn out to be the adopted one and prepares his brief and argument to correspond.

Keeping in mind the above situations, neither of which may exist, and that the first pleading revealing but one cause of action is set forth in a single count, the issues for argumentative purposes may be said to fall into three classes. First, the primary issue; second, the intermediary issue or issues, and lastly, the final or ultimate issue or issues.

First. The primary issue is the original charge of guilt, wrong or illegality against the defendant and is neither the general rule of law implied in the pleadings as the major premise, nor on the other hand the facts alleged in the pleadings expressly as a minor premise which bring the concrete facts under the rule, but in distinction from each of these is the legal effect and logical conclusion following by necessary inference from the relation of the two premises together. Thus in an action for murder the primary charge is that A is guilty of murder. This is a logical and legal conclusion of law and inferred from two premises, to wit: a rule of law, that anyone who does acts X, Y and Z is guilty of murder, and that A did acts X, Y and Z. Nor should the primary issue appear expressly in the pleadings, since by both the rule of logical reasoning and legal procedure one can not use as a means in the proof the end or conclusion itself to be reached by such proof, for this would amount to begging the question from a logical viewpoint constituting a fundamental error, and amount to alleging a legal effect, or a conclusion of law, from the legal point of view which has in mind the avoidance of the same fallacy.

Second. The intermediary issue, or issues, for there may be more than one of these, may not only be in the same rank and co-ordinate with each other, but may consti-

tute two or more files one below the other. Not often will analysis either disclose or require more than two orders of intermediary issues. The rule of law invoked in the theory of the case will constitute one of these, nor is it required except in special cases prescribed by law to be expressly alleged, for the court is presumed to take judicial notice of statutes and laws, but it is required to be clearly inferred by implication. Another intermediary issue of the same rank and file that is co-ordinate will be the express allegation of the ultimate facts set forth in the pleading and which brings the specific case under a general rule of law. And still other intermediary issues of the subordinate rank and file may be germane to this one, being subconcepts of law in turn, which together compose the ultimate facts alleged above. Beyond these stages a case seldom descends. Sometimes, however, the dissolution of these concepts into specific instances of fact may occur, that is, concept X may contain issues of fact A, B and C, while A in turn may depend upon proving another fact a or b or c, etc., and so also B and C in like manner. Such issues are, however, only issues in the wider sense of the term and usually arise in connection with circumstantial evidence. These are found below the superstructure and lead to the last class or ultimate issues.

Third. The final issue or issues are those lying at the bottom of the chain of supports, and in complex cases are only reached, distinguished and isolated after careful and critical analysis. They are not overtly expressed in the higher issues, but must be reached by logical inference from them. Moreover, around these ultimate issues the battle lines of evidence will finally be marshaled, for upon their substantiation or fall will stand or fall the proof of the primary issues at the beginning about which little or no contest is waged, but upon

which in the end the whole weight of the result of these subissues will fall. In this manner the advocate plans in advance the line of evidence, knows what he must prove and what critical points he also must argue. The argumentative evidence will therefore chiefly deal with the subissues of fact at the bottom, but the proof in summary will be brought to bear upon the initial and primary issue which will come to the front when the decision is rendered.

Not only is it important to classify the issues from the standpoint of the prover and the logical sequence of proof, but it is also extremely essential to classify them further on the basis of the tribunal of adjudication annexed thereto. From this point of view they consist of three kinds, namely, issues of law, issues of mixed law and fact and issues of fact. The decision of issues of law is exclusively the prerogative of the court, that of issues of fact is normally the duty of the jury, while issues of mixed law and fact are subjects sometimes for the jurisdiction of one and sometimes of the other. It is significant to note by what method these issues are raised by the defendant.

1. The correctness of the rule of law both as to form and content is raised by motion to make more specific and certain, or to strike out or amend.
2. The correctness but not truth of the allegation of fact as a minor premise, revealing a major premise, is tested by demurrer either as to form or substance.
3. The truth of the allegation of fact is resisted by denial in a subsequent pleading.
4. The validity of the legal effect produced by the combination of the hypothesis of law in the major premise and hypothesis of fact and the ultimate facts alleged is resisted by pleading a counterissue in the form of new matter in justification or excuse.

Having located the several issues definitely and classified

them in the order in which they occur in the line of deduction and argument; and with the added knowledge of which must be established by the evidence in consequence of such order and whose proof will depend thereon; and further, as to how these issues will stand from the viewpoint of the defense as modified by motion, challenged by demurrer, admitted, denied, or countered by confession and avoidance; and having analyzed the final details until the doubtful but necessary factual issues lie revealed—having all of these things in mind the advocate should then reduce the critical issues to the form of succinct propositions. They should be so worded as to contain one simple statement each and so precisely that no ambiguous terms permit of double or confused meaning and so that they neither include what is not essential nor exclude what is essential. Moreover, these statements of what is to be proved or disproved should be made easily comprehensible to both court and jury and should require no further explanation to make clear their exact import. Thereupon the advocate is ready to set before the court or jury an adequate and clearcut statement of the case, is ready also to arrange the order of his evidence and prepare his brief, not only for the conduct of the trial, but for his final argument at the close.

CHAPTER XV.

PLACING THE BURDEN OF PROOF.

Theories and Rules.

The process of adducing evidence for or against a proposition standing as an issue in an action under litigation may be likened to an official accounting between two parties in which there are credit and debit columns to be summed up. The credits allowed are of three general kinds; to wit: (1) Those which the law prescribes in advance to belong to the inherent nature of certain subject-matter; (2) those which one party to the dispute admits and concedes to the other party; and lastly (3) whatever evidence can be produced by either party material and admissible to the controversy. When by analogy the books are closed, the columns are footed up and the values credited, the two sides are compared to discover in whose favor the balance lies. The one possessing the balance wins the issue, but the law further prescribes that certain handicaps be imposed upon the party espousing a particular side of the issue by requiring that in some instances more than a preponderance of the credits be necessary to win, that even enough credits must be amassed to produce the effect upon the jury of excluding a reasonable doubt to the contrary.

There is, however, no uniform rule of law by which an advocate may know upon which side of a particular issue the handicap will be imposed, for this is determined by a general policy of fairness and justice depending in application upon the nature of the particular circumstances or subject-matter and must be learned by recourse to the law and the facts. Nevertheless there are certain groups and classes of cases which follow a general ruling as, for example: the handicap "to prove beyond a reasonable doubt" is always imposed

upon the party charging a criminal offense, and conversely to prove by a preponderance of evidence in all civil cases; but upon which party the burden falls in the latter class varies according to the subject-matter. From the fact, however, that the law does not always specify upon which party the handicap lies relative to an issue, the courts have long endeavored to formulate some rule to indicate where it belongs in cases not so provided, but with very indifferent and unsatisfactory results, so that it may be said that the courts at the present time have accepted no test as entirely reliable. The following principles have been suggested at different times and by different jurisdictions:

1. It has been suggested that the handicap rests upon the party to an issue who has made an affirmative allegation. This might be more reliable if its meaning were clear, but it may mean either of two things: (a) The party who alleges affirmatively the commission of an act or the existence of a thing; or (b) the person who alleges in an affirmative form the omission of an act or the nonexistence of a thing. The confusion is as to whether the affirmative is the mode of alleging, or the positive or negative character of the thing affirmed.
2. Again, it has been held that the handicap is upon the party which must first introduce evidence in order to win, but this is also somewhat uncertain in meaning, for it does not explain whether the appropriation of a legal credit in the form of a presumption is to be considered as the introduction of evidence, nor whether a similar appropriation of an admission by the opposite party is to be classified as evidence, nor whether the handicap refers to a more general issue of which this subissue is raised as a part of its establishment, nor to the decision merely of the subissue as a temporary affair.
3. Again, it has been said that the handicap reposes upon the party having a peculiar and advantageous knowledge of the circumstances, and while this has been

the reason in some cases for the law to fix the handicap as in examples of negligence, yet the test is not always valid, and hence not a working rule, for it would exact for instance that the plaintiff in an action for defamation on a charge of living in adultery prove that he is lawfully married.

4. So also it has been contended that the handicap rests upon the party to whose case the fact or issue is essential, but this is of no practical service as a test for it merely pushes the question forward one notch and depends in turn upon the equally difficult problem as to whose case the fact is essential.
5. Once more, it is sometimes asserted that the handicap belongs to the party having the burden of the issue, but it is plain in this test that the test is not a test at all, but merely a rewording of the question to be solved by the test. Having the handicap and having the burden of the issue are one and the same thing.
6. And still another view maintains that the handicap is germane to the party who is the proponent of the issue, but the question immediately arises as to who is the proponent of the issue, he who proposes the issue out of which another one springs—is he the proponent of both, or is it he who proposes an issue regardless of its relation to a more general issue?
7. Finally, perhaps as good a working test as is possible under all the circumstances and confusion relating to the subject is the statement that the handicap rests upon the party who seeks to alter the existing state of things, that is, who runs counter to a presumption.

The handicap just described, of making out a certain amount of credits in order to win, goes always to the debit column of one or the other of the parties upon every separate issue, whatever be its effect upon other issues. This handicap is legally known as the "burden of proof". Unfortunately for all concerned, the phrase has been used confusedly by the courts to signify two different things, to wit:

1. The burden of running the risk of not having met

and overcome the handicap when the books are closed for a decision either by the court or jury.

2. The burden of running the risk of having the books closed prematurely and an adverse decision rendered by the court, or of having a favorable decision of the jury reversed by being set aside by the court.

Now it is important to note the difference between these two burdens and their assignment. The first, it is evident, is upon one party only and remains fixed throughout, and is terminated and removed only when the trial closes either by a court decision or a decision by the jury, while the second burden is upon both parties and may be removed one or more times during the trial. Again, the first is a burden to pass a danger which centers at the handicap limit of a "preponderance of evidence" or "beyond a reasonable doubt" while the second is a danger which lurks around the extremes of a "scintilla of evidence" or "an overwhelming or conclusive case". And finally, the first is a burden of aggression, while the second is one of resistance, the goal of the former is to secure a favorable decision as soon as possible, and the goal of the latter to prevent an unfavorable one as long as possible.

A further explanation of this difference is that in all logical argument upon a proposition, but one party needs to prove, while both parties may find it necessary to refute. Hence a burden of resistance or of refutation in order to win may arise at intervals during the stages of a trial, first on one side and then on the other. This has given rise to the idea of a shifting of the burden, which is an illusion and nothing more than each side in turn either adding more evidence to sustain its burden of proof, or to refute other evidence to prevent its overthrow, or by the party having no burden of proof in resistance to the efforts of his adversary.

This second use of the phrase "burden of proof" has likewise been denominated at times a "burden of procedure"

and in such sense as being a requirement to keep the machinery moving it deserves some further consideration. For it may be asked why is there any risk or hesitation about letting the trial come to a close. The answer is that each side desires every opportunity to win which is possible, and if one can not win the case before it goes its natural length to the jury he wants an opportunity to persuade the jury. He does not want the case decided against him before it can be submitted to the jury. For it must be remembered that the law has provided not only certain requirements before a case can be won after it has reached the jury, but also certain requirements without which it will not be permitted to go to the jury. Thus while the law provides certain credits to help on a case, it also provides certain penalties if the parties do not produce an assigned quantum of evidence. This demand stimulates the parties to keep the issue in some sort of a balance, or the party falling extremely behind to have the court take the issue away from the jury and decide it at once as a question of law. Obviously therefore it is to the interest of each party to resist the danger of having his opponent secure a decision by the court against him on account of a less than minimum amount of evidence on his side, and conversely is just as much interested in forcing a favorable decision for himself because of an overwhelming or conclusive amount of evidence in his favor. Thus when a chance of winning by a decision of the court arises the party so interested usually moves, or the court upon its own motion takes the case from the jury and decides it forthwith. This burden, therefore, of preventing the action from coming to a close and of keeping it going until the issue has passed the first stage of determination and reaches the jury, always becomes critical when the case is at one or the other extremes of evidentiary probity, and upon the party who is about to lose the decision. If, however, enough evidence is forthcoming to pass by these legally fixed extremes the burden dis-

appears, and the prerogative of the court is no longer applicable for an issue in which the evidence hovers around the legally fixed degree of a "preponderance of evidence" or "beyond a reasonable doubt" is a question which is normally subject-matter for the jury.

Legal Evidentiary Credits and Handicaps.

Some further discussion will prove profitable concerning the different elements recognized by law as entering into the computation of credits and handicaps in determining the decision of a case. Legal credits, to use the term of "accounting" by way of analogy, constitute certain evidentiary probabilities of fact which inure to the benefit and advantage of a favorable decision to a party by reason of justice and fairness, and so provided by law. They advance the cause of such party to an extent measured by the particular credit may accrue on either side and at different stages of the litigation. They all have an argumentative bearing in relation to the validity of the primary issue and should be reckoned in the computation toward this end. They may be enumerated as credits of "judicial notice", "admissions", "fixed presumptions", "earned presumptions" and "discretionary presumptions".

Set over against these legal specifications concerning the use of evidence in the case are a converse set of disadvantages which may be described upon the trial ledger as debits and which operate as handicaps to the party who would win the case. These are also provided by law and for reasons of public policy, justice and safety, in order that successful litigation must show its merits by overcoming a reasonable amount of obstacles. These may be most clearly described as handicaps, (1) of initiative, (2) of continuance and (3) of result. When all three of these handicaps are found to be imposed upon the party espousing an issue they together

constitute the burden of proof in its proper sense as relating to that issue. When but the handicap of "continuance" is necessarily imposed upon a party it may be called the burden of resistance or procedure.

In considering further the class of credits we find that, by a rule of law, certain statutes and facts of nature, geography and history are held to be judicially known, and hence require no evidence in proof thereof. As a matter of consequence therefore such elements, when they are of a probative nature in the case, may be used as evidence and are credits to the account of the party finding them available for use.

In the next place, material relevant to an issue may be admitted by the party against whom it has probative force, and while this has the effect of removing it from further contention it does not remove, but actually confirms its probative effect upon the final decision. Such matter becomes evidentiary credit to augment the side of the case to which it is conceded. It is obvious that evidence is none the less evidence because it is admitted, for then more than ever it tends to produce proof of the issue under which it arises.

Again the law has deemed it to be just and fair that certain conditions in life should be presumed to be true without any evidence being required to give them such a standing, and thus to have a probative evidentiary value in proportion to their nature. These presumptions are fixed and known to the law as "legal presumptions". They are not earned by the advocate nor conditioned upon the discretion of the court, but are legal values put upon the face of the conditions represented. Examples of these presumptions are those of the innocence of the defendant, sanity of mind, regularity of official action, due care, title of property in the possessor and many others. It is once more obvious that a presumption of this nature falling in support of either side of an issue will prove a valuable asset as evidence in the decision of the case.¹

¹ *New Orleans v. United States*, 10 Pet. (U. S.) 721; *Shipherd*

Of course these presumptions may be overcome by evidence in which case their value, as a matter of course, is cancelled out unless they be what are known as conclusive in contrast to *prima facie* in effect, in which case their probative value is absolutely decisive upon the point.

Still another form of credit is that form of presumption which is not "given" by the law, but is a certain probative value ascribed to evidence when a given amount has been produced. Thus the law may provide not that a promissory note in itself is a presumption of its validity, but that a *prima facie* presumption of validity will be raised when the advocate has introduced the note in evidence and proved the identity of the signatures. Here then is a species of advantage in evidentiary credit obtained by earning the reward in complying with the legal conditions imposed as a condition precedent to the credit. The significance of such credits of presumption is that they mark a winning margin provided they are not rebutted by other evidence. Of course this effect relates to the immediate issue under which they arise.

Finally, there is a form of credit known as a presumption of fact, which is neither fixed by law to a given situation, nor made conditional upon a certain definite amount of evidence, but is reposed within the discretion and judgment of the court. In one sense this is also a result from amassing evidence, but the amount necessary is whatever is sufficient to appeal to the judgment of the court. Thus a fixed presumption of proper care by the defendant in a railroad wreck might be overthrown by showing that the injured person at the time of the accident was quietly sitting in his seat, and this in turn might be countered by raising a discretionary presumption of negligence, through proving not only that the shock came while sitting in the described position which in

v. Underwood, 55 Ill. 482; Gannon v. Ruffin, 151 Mass. 204; Gordon v. People, 33 N. Y. 509; Jackson v. Warford, 7 Wend. (N. Y.) 62; 1 Greenleaf Ev. (16th ed.) §§ 14w, 41, 42.

itself would not be sufficient, but that the shock came from causes connected with the management of the train. The law prescribes that there is never a fixed presumption of negligence, but does not preclude the raising of such a presumption by a proper amount of evidence in the form of an earned credit.

What becomes a credit on one side becomes inversely the basis for a handicap upon the other, although handicaps are not limited in origin to this source. The first handicap in order is that of initiative. It is certain that in an issue which will not be decided upon the face of the pleadings it is requisite that upon one of the parties be placed the duty to first introduce evidence. This is not an onerous duty, but the law holds it fair to require him who proposes a new issue to back up his charge and demand with some evidence and to do so before he is entitled to any decision in his favor. Of course this is not operative where the defendant fails to appear unless it be necessary as a basis for the estimation of damages. Such a decision is not based upon the merits of the case, but is especially imposed by law as a penalty for the default of a necessary party. This handicap is therefore always imposed upon the plaintiff to the primary issue in all regular actions, for he is necessarily the proponent of a new issue, but it will likewise be imposed upon the defendant to the primary issue if in defense he proposes a new issue in confession and avoidance, or again upon the plaintiff if in reply to this, he in turn defends by a plea in confession and avoidance. Thus the handicap of initiative always rests upon the party who proposes the primary issue, and upon either party thereafter who proposes a new counterissue in confession and avoidance.

However, the second species of handicap, that of "continuance", is a burden placed upon both parties to a case to prevent the loss of their most complete opportunity to win by getting the case past the judge, if it be not any too strong,

and into the hands of the jury. This handicap is made to save needless time and trouble where the evidence, pro or con, shows that the outcome of the issue is clear, and for economic reasons should be terminated at once by the court. Thus each party is compelled to assume the handicap of not only making at the outset a reasonably good showing, but of maintaining his case in such a state of probity. This handicap works differently for the proponent and defendant of an issue. While the proponent strives to overcome the handicap of failure in the start, he reaps a double success if he wins, for the first danger is not only removed, but he has by the same massing of evidence raised a presumption in his favor. Not only has he avoided a loss of the decision, but he has passed the margin of a *prima facie* case which insures him victory if the opposition is unable to rebut the same. On the other hand the handicap rests upon the defendant to an issue to prevent the proponent from amassing a case so strong as to be overwhelming, or to raise a conclusive presumption of fact. In some cases in which the law has defined what marks a conclusive case the defense is helpless to resist at all, but where it is within the discretion of the judge he has the opportunity of rebuttal. In some cases, to be sure, he may in turn raise a counterpresumption in the effort to stave off a conclusive case, but these instances are uncommon. Therefore the defendant to the issue has by this handicap of "continuance" everything to lose and nothing but the final recourse to the jury to gain, a result which also accrues to the proponent.

Although conceded not to be an arbitrary matter of decision considerable difficulty has been encountered to know what standard of measure should determine the judge in ruling upon these two instances of this form of handicap. Thus in ruling on a lack of evidence or enough to make a *prima facie* case where the latter is not definitely prescribed by law an old phrase that "a mere scintilla of evidence" is

sufficient, has not met with favor and a *prima facie* case of negligence has been decided not to have been made out by evidence of a single instance of a runaway. It is generally admitted that the ruling should depend upon the nature of the evidence and therefore such a ruling has seldom been made to serve as a precedent. The consensus of opinion seems to be that the test, "Is there evidence"? is not sufficient, and that a better test would be, "Are these facts in evidence such that, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain"?

Again, in ruling upon the second application of this handicap of continuance, or conclusive presumption, a similar difficulty exists. In some instances the court is bound to follow a legal provision that a certain kind of evidence is conclusive upon the issue. This is interpreted not to mean that the inference from such data is irrefutable in any degree, but that the given evidence of such a kind makes it unnecessary to proceed further, that the law makes it conclusive for the purpose, and therefore *ipso facto* the case is thereupon decided. The court has only to put into effect the handicap. But when such a margin is not prescribed definitely by law there may still arise a conclusive presumption springing out of the original force of the evidence upon the mind of the court, and this renders the standard of decision somewhat uncertain. No doubt the same general principle which is held to apply in the preceding case of a minimum amount of evidence is equally applicable to a conclusive amount of evidence.

The third and last species of handicap, namely, that of result, has also given rise to some nice questions of interpretation, especially since it is based upon an effect produced in the mind either of the court or the jury. The margin prescribed by law and critically insisted upon that the evidence to win must be a "preponderance of the evidence" and "be-

yond a reasonable doubt" upon the proponent of certain new issues, after all marks a condition produced in the mind and not inherent in the evidence as such. No physical test could reveal the necessary condition in the data without taking into consideration the mind to be affected. Different minds in different states of knowledge, attached to different characters and subject to different emotions, might react to the same data in different ways and with different results. The courts are therefore extremely careful in important cases to make these guide standards as workable as possible.

The first and most common species of the handicap of result is that of a handicap of "a preponderance of evidence". This is the least difficult of the three handicaps of result, for it operates simply to turn the scale when it is in balance. It presupposes a status of the evidence at the close of the trial in which the evidence is relatively equal. If there had been an extreme inequality of evidence it would in all probability have been decided by the court upon the ground of too little evidence; or as an overwhelming case. As it now stands, the jury must be impressed that the proponent of the primary issue has not only equaled, but outweighed his opponent in the matter of evidence. However simple the phrase "the preponderance of evidence" is the courts have felt constrained in many instances to vary the wording in the hope of rendering it still clearer. Thus the terms "satisfied, convinced" and still others have been employed and not infrequently the effort to define further has been held to illegally require too much, as, for example, "by a preponderance of proof to your reasonable satisfaction", "clear preponderance and convincing proof", "convince the minds of the jury", "clear and convincing proof", have all been held improper. The peculiar danger to the jury in the application of this requirement is a subtle tendency to use the continental, numerical, quantitative conception of evidence repudiated by our law, that a little more stuff on the one side tips the bal-

ance, although such stuff might have no value at all, particularly when helped on by such an inference as that an unrefuted witness must be believed, thereby easily making the error of crediting from this fact some force of evidence by virtue of having testified to something.

This handicap, as indicated by the word "result", is satisfied not by producing a condition attributable to the evidence itself, could it be computed by an "adding machine" and thus remove the personal element, but by the mental effect produced in the minds of the jury that a preponderance of evidence has been shown by the proponent in terms of what they take preponderance of evidence to mean. This is the reason why the courts attempt to translate the test from terms which have an objective reference to some subjective condition of the mind which the juror may more easily detect by consulting his own feelings and experiences in connection with the evidence heard.

However, it is doubtful whether subjective terminology will improve the commonly accepted phrase, for the multiplication of words entail a corresponding number of further suggestions and possible errors, so that the best authorities do not favor much variation in the way of phraseology, and yet it is equally doubtful if the law ever contemplated that the effect upon a mind which voluntarily or otherwise was not fully open to receive the evidence in an impartial manner should be such a test as that required. The above handicap has been uniformly placed upon the proponent of an issue in all civil cases, with a few exceptions which will now be noted.

The second species of the handicap of "result" falls somewhere between the extremes of a "preponderance of evidence" and a "reasonable doubt", and may be expressed in the words "clear and convincing proof" and in such other phrases as "clear, convincing, beyond reasonable controversy", "convincing, not merely preponderating", "clear, unequivocal and convincing", "clear and satisfactory evidence"

and "should be proved in the clearest manner and the evidence ought to be above suspicion". These expressions endeavor to formulate a stricter standard than that of the first handicap on account of the peculiar nature of the subject-matter. Thus it applies in actions upon "fraud", "existence and contents of a lost will", "mutual mistake to reform an instrument" and a few other similar cases.

The third species of the handicap of "result" is expressed by the uniformly accepted phrase "beyond a reasonable doubt". This most severe handicap is limited in application to criminal cases where the presumption of innocence is always peculiarly strong, although an effort has been made without success to apply this standard to some civil cases, especially in those where a criminal act is charged as a part of the case. The precise distinction, contained in the phrase, "beyond a reasonable doubt", according to Wigmore, seems to have had its origin about the year 1800 and to be applied only in criminal cases. Nor was it expressed in any fixed phrase, but in such terms as a "clear impression", "upon clear grounds", "satisfied" among the earliest forms of expression. Then follows "rational doubt", "rational and well grounded doubt", "beyond the probability of doubt" and finally "reasonable doubt" became the preferable wording. However, the element of moral certainty was also suggested in the formula "moral certainty to the exclusion of a reasonable doubt". It is interesting to observe how the definition was gradually strengthened and distinguished from the phraseology appropriate to the second species of standard by the adding of "beyond a doubt" and later qualifying the term "doubt" with the word "reasonable". It would now appear that the element of moral certainty is hardly considered necessary, for the courts have continually resorted to various efforts to explain the phrase as it now stands without the further complexing idea of "moral certainty". While the better authorities agree that detailed amplification of the

phrase is more likely to add to the confusion than to clarify the idea for purposes of the jury, yet some consideration of the limitations of this very important phrase may prove of value to the advocate from an argumentative point of view.

It will be noted at once that two elements must obviously be present in this test, the existence of a doubt and the existence of its reasonableness. Both of these factors moreover are noted to be subjective mental conditions, but there is a wide difference between the implications of the two. The latter is descriptive of a mental state while the former is an objective check upon the pure subjectivity of the latter. The word "reasonable" not only attaches a quality to the doubt, but limits it to an external cause. Proof in this instance is not incompatible with a doubt as such, but only with a doubt of a certain kind. It may be inferred from this that a doubt which springs merely from a subjective condition of mind alone is held not a sufficient test. For example, the mind might be in a state of doubt from a defective memory which can not retain a distinct impression of the evidence adduced or from a lack of comprehension of the evidence from a temporary feeling of indisposition during the trial. Such conditions might arise even though the juror had honestly believed himself capable of performing his duty properly. A doubt, however, to be reasonable must bear some relation to the external consistency among the facts themselves, else a fanciful dread of conviction might easily be translated into a doubt. Then, too, a question might arise as to whether the doubt should be based upon a logical consideration or a moral one. A jurymen might construe that his function is wider than a logical estimation of the values of the evidence, that it covers to some degree his personal feeling of oughtness, whether some leniency would not be the proper measure of justice, and whether he did not bear a certain personal accountability in the matter outside and above the mere machinery of the law.

No doubt ideas of this kind not infrequently embarrass a conscientious jurymen. Or again a jurymen feeling some reluctance might argue to himself that the will of the majority after all should determine whether such a doubt exists, and thereby waive his own impression in favor of an abstraction. In short, should the absence of a doubt spring from the state of the individual mind or from a consensus judgment arrived at by concession and compromise? Of course the law bases its value of the jury system upon a unanimity of distinct individual judgments and not upon a formal unity reached by consultation and concession. It is well for the advocate as far as possible in his argument to adapt himself to such possibilities.

It is not peculiar that courts should try to set the jury aright in relation to what is meant by a reasonable doubt by frequently defining it "as such a doubt as would be raised in the mind of a reasonable man upon a consideration of the whole of the evidence". Yet it is hard to see wherein this amounts to more than a shifting of the difficulty, for it is about as hard to define what is a reasonable man as what is a reasonable doubt. To be sure it sounds easier and possibly because we are more familiar with reasonable men than reasonable doubts, it may be easier, but it would seem that something more definite should be possible. By a process it might be inferred that a reasonable man is one who comes to his conclusions upon something more tangible than vague feelings and impressions. He casts about for reasons or evidence to support the suggestion. This naturally brings him to a comparison of external conditions with a view of testing the idea by force of its own consistency or inconsistency with facts about.

Under the test of reasonableness the question is apt to arise whether the sheer possibility alone of a thing happening is a sufficient ground to raise a reasonable doubt of the contrary or would it require not merely possibility, but also

probability, or not only slight probability, but strong probability, to constitute a properly founded reasonableness of doubt? Probably as reliable an answer to this as any would be that what is necessary to make a doubt reasonable in antagonism to an array of fact would depend upon the strength and completeness of the evidence against which it is directed. For example, an unbroken and perfectly fitting chain of circumstances would stand out strongly against a doubt supported by a mere possibility backed by no evidence whatever of a positive kind. Were, however, the circumstances fragmentary or sadly incomplete, then it is probable that a possibility even though stripped of any supporting positive evidence, but taken in connection with the state of the opposing data would be construed to raise a reasonable doubt.

Instructions to jurors have been sanctioned which have said that if any single fact in the evidence is inconsistent with the theory of guilt then it is sufficient to raise a reasonable doubt, or that the theory of guilt must be so complete as to exclude any other hypothesis by which the thing could have happened. The first of these manifestly defines the effect of a minimum of positive evidence against a theory of guilt rather than evidence directly in support of a possibility of innocence, while the latter clearly defines the effect produced by possibility alone. It would thus seem that clear possibility, plus some positive evidence to support, however small, would be a sound basis upon which to predicate a reasonable doubt and furnish something to serve as a test as well.

CHAPTER XVI.

SUMMING UP THE EVIDENCE.

Advantages.

A clear understanding by the advocate of how the evidence may best be summed up at the close has three distinct advantages. In the first place, it assists in preparing the evidence for trial; in the second place, it enables him to so present the case to the jury that the latter may better appreciate the bearings of the evidence, and lastly, it supplies him with a system of reviewing the evidence with a view of establishing his own side of the case to the best possible advantage. A complete summing up of the case demands that all probative matter be covered whether introduced in a formal way before or during the trial or essentially involved in the case by necessary legal implication.

The American versus the Continental Standard.

Assuming that the evidence is all in, and that, as in the normal action at law, it is divided into two bodies, that in support of the primary issue and that against it, the problem arises as to how these two bodies of evidence are to be measured with a view to comparing results and striking a balance in favor of one or the other contending parties. Naturally two standards of computation suggest themselves—the one more simple, that of quantitative measurement, and the other more complex, that of value. Obviously, if all the materials of evidence were of equal value the process of addition and subtraction would be entirely adequate, but the opposite condition being perhaps always true, such a method

of calculation seems erroneous. However, historically speaking, the quantitative standard, applied numerically, was the earliest adopted method of computing evidence being the system generally employed by the civil law, and in the continental countries. All witnesses were of equal force, and all oaths of equal truthfulness, so that the reckoning was very simple. However, the system provided for numerical quantity of evidence to produce proof varying according to the kind of issue to be proved, and some of these provisions have become transplanted into our system in face of the fact that the quantitative standard, for the purpose of measuring the force of evidence once introduced, has been repudiated. Thus, says Wigmore in his great work upon evidence, "regarded as requiring more than a single piece of admissible evidence these rules may be termed quantitative; regarded as requiring various pieces of evidence to be associated in presentation in order that any one of them may ultimately be of service, these rules may be termed synthetic".

Nevertheless a practical difficulty lies in separating a quantitative measure from one of value. Value in connection with evidence means impressive force upon the mind of judge or jury. Now the impressive force that wins is a total effect produced by many bits and units of evidence. While it is not proper to add these portions of material it is proper to add together, or mass, or fuse together the separate values of each, or the separate mental impressions made. But how can this be done without a quantitative idea of amassing values, if not indeed numerically counting them? By psychological experiment it is found that by doubling the amount of stimulating material does not always result in doubling the effect. The relation of physical stimuli to mental effects is too subtle and intricate a problem ever to be practical in estimating evidence. Yet the jury is instructed to make up its verdict after taking into account all of the evidence and giving each part such weight as it deems

fit under all the circumstances. This implies some process of unifying the various effects or values set upon the different portions of evidence, and of getting a collective impression which it can compare with a similar collective impression taken from evidence on the opposite side. It is extremely doubtful if such values can be estimated in terms of mental effect alone and, as a matter of practical experience, the jury is allowed to solve this problem for themselves with the advisory injunction that it is the weight of evidence which should determine the case and not merely the question of amount. Thus while the law repudiates the general method of summing up through counting by numerical units, it does permit the amassing of weights or values attributed to different material units, however inseparable the notion of amassing may be from a quantitative standard.

As a matter of fact, while the law endeavors to follow the general principles of psychology, ethics and logic, it finds itself powerless to adjust itself to the niceties of these sciences on account of the nature of its problem. It can itself be an inexact, approximate science only, because it deals with uncertain data under relatively uncontrolled conditions of time and place. To be sure it strives for as much precision as possible by prescribing numerous supplementary rules so that these sciences may be obeyed as far as possible. Thus in line with ordinary logic the law recognizes different degrees of probative value in material of evidence ranging from the wholly valueless to the conclusive. Moreover it recognizes that evidence may be directed either toward an issue in support or contravention, or against other evidence in rebuttal or refutation. In this way portions of evidence from opposite sides are coupled or matched together and disclose their true values in the test of this interlocking. The final problem of summing up the case becomes therefore as much of a process of eliminating the waste product of these inter-

locking conflicts as of a summing up of the residuum—a negative process to get a positive result.

Under the head of the Classification of Issues it was found that the primary issue might rest upon issues of fact directly, or upon intermediary issues and conclusions in the nature of concepts of law resting upon other issues of fact, or of general inferences drawn from other ulterior facts. Of course where there are no intermediary issues the process of eliminating evidentiary matter begins with the issues of fact directly in support of the primary issue, but where there are intermediary issues, these issues must be given evidentiary probative value by establishing the issues of fact upon which they ultimately rest, otherwise they constitute no more than empty propositions. Established by proofs of their foundation they become in turn evidentiary proof of the primary issue. The primary issue may rest therefore wholly upon direct issues of fact, or wholly upon conclusions of law or of fact raised to the plane of evidence, or upon a combination of both. In either case the process of eliminating the waste materials of evidence rendered valueless, or refuted by interlocking attack should be begun with the ulterior issues of fact.

Bodies of Evidence.

Proceeding according to the order of proof just outlined, the status of each part of the evidence will be found to organize under one or the other of the following relationships, to wit:

1. Evidence on one side only and admitted by the other side both as to truth and effect.
2. Evidence on one side only, but neither admitted nor denied expressly by the other.
3. Evidence of the issue on one side only, but contended by the other that while the facts are true the effect claimed is defeated by other considerations.

4. Evidence on the issue by both sides, but one set of evidence weakened through partial refutation by the other.
5. Evidence on the issue by both sides, but one set of evidence a complete contradiction of the other.
6. Evidence bearing upon the issue directly from both sides, and while not contradictory of each other, yet lead to different results either balancing or not in strength in probative effect.

The following observations concerning these relationships should be noted by the advocate in summing up the evidence as follows:

The first body of evidence here mentioned may be said to include four varieties, namely, judicial admissions, admissions by pleading, extrajudicial admissions, un rebutted presumptions and matters judicially noticed.

Judicial admissions may be made by stipulation before the court for purposes of trial, and thereupon stand at their full probative value to the credit of the opponent.

Admissions of fact, made in the pleadings, are upon the record credited at their full probative evidentiary value unless admitted merely for the purpose of denying their effect, as in the case of demurrer or in the pleading of confession and avoidance.

So also extrajudicial or informal admissions may appear during the trial as a piece of circumstantial evidence or otherwise, and vary in probative force accordingly as they are made unintentionally or against interest or as affected by whatever condition the jury may deem proper to take into consideration.

Admitted matter it might be objected is not evidence in the technical sense, for it is not introduced to settle an issue once raised, but rather to remove it from litigation. This contention would be important if the admission had no probative effect in the final determination of the case, but such is not true, for it gives the material the maximum probative

force, and hence the highest evidentiary effect. It would scarcely sound reasonable to say that evidence was any the less evidence in the wider application of the same in adjudication of the matter in dispute merely because it could not be refuted or denied.

In this connection the legal presumption unrebutted carries with it the full probative value ascribed to it by law, but in case it be matched by rebuttal material such evidence at once falls within another class. Where a presumption is rebutted, if it be a fixed presumption resting upon no evidence, the value obviously being no more than a creation of law vanishes, but if it be in the nature of an earned presumption then a rebuttal of the legal effect of the presumption may be overthrown without entirely destroying in all cases the whole force of the amassed evidence. Unrebutted, a presumption results in a net gain toward the goal of "a preponderance of evidence", or in some instances a "convinced mind" or in criminal cases "beyond a reasonable doubt".

Finally, materials judicially noticed have the full probative logical evidentiary value inherent within them without contention, and may be used freely in determining any issue involved in the case to which they are relevant.

For purposes of final argument this material of evidence is conclusive as far as it goes toward the final determination and removes this body of evidence from further doubt in the minds of the jury.

The second body of evidence constitutes a class of unmatched material neither admitted nor antagonized by other evidence, but is left unmarred to exert whatever probative influence it may. Such evidence is usually, or presumably, held of slight consequence or irrefutable by the opposition and considered least dangerous when passed over in silence. This too may be credited to the proper side with little difficulty by the jury.

The third body of evidence is of supreme importance, for

it involves an interlock which may have the effect of nullifying all of the evidence in support of the primary issue or of any evidence in contraversion of such issue. The peculiar effect of this matching of evidence is that it is not an attack upon the facts alleged in an issue, but upon their legal effect. It confesses the truth of the allegation, but nullifies the effect by means of a counterallegation of new matter in justification or excuse. As already mentioned, this is an interlock between issues rather than between the facts of the issues, the truth of the facts of the second issue destroying the legal effect of the facts presented in the first or preceding issue. The real battle of evidence is thus transferred to the question of the truth of the succeeding issue, and as it goes so goes all that is conditioned upon it. By a well known rule of pleading unless inconsistent defenses are permitted the whole battleground is shifted as often as new matter in confession and avoidance is pleaded, and the last stand will determine the entire case, for all prior issues are by concession conditioned upon the last one. The waging of evidence upon such final issue, however, in turn may involve any or all of the other classes of evidence. It is an interlock of a generic type which will bring all of the evidence in the case as species under it unless the pleadings contain inconsistent defenses. The effect of this defense is in establishing a legal condition imposed by law to be unsatisfied. The legal requirement in order to bring a lawful action is that the plaintiff allege a cause of action. Unless the facts alleged express such a cause they do not have any condemnatory effect and are perfectly lawful as far as the particular action in point is concerned. The nature of this defense is to admit the facts to be true, but to allege other facts in addition which render the former legally inoffensive.

But again evidence may be rendered nugatory through the lack of satisfying another form of legal condition, namely, that of a quantitative nature inherited from the civil law.

For example, the law requires in certain cases the testimony of one witness to be corroborated by that of another, as in the case of an accomplice, or the confession of the accused in a criminal case. Thus the requirement may even call for a number of witnesses or a particular kind of witness, as, for instance, an eye-witness, or again the verbal completeness of an instrument or of an oral utterance, or still other conditions relative to circumstantial evidence, the effect of which conditions is that if they are not strictly complied with the evidence introduced already in partial compliance is rendered valueless in probative effect upon the point thus involved. Such evidence must in instance of such failure be cast wholly out of the computation.

Once more the court may impose as a condition of admissibility that the evidence sought to be introduced be later connected with other evidence, and if it afterward occurs that this legal condition is unsatisfied such evidence should thereafter be stricken out by the instructions of the court to the jury, but having once been placed before the attention of the jury it at best can hardly forget the material and no doubt finds some difficulty in treating such evidence as having no probative effect and amounting in fact merely to legal refuse.

A fourth body of evidence may consist in a particular fact, group of facts or system of facts expressing a theory, being resisted and wholly disputed and contradicted by other evidence in refutation of these indicia themselves. This interlock develops on the principle that if the latter evidence is true the former is necessarily false, and vice versa. Thus one witness testifies that an event took place at a definite time, but another witness, under an equal or more favorable position to know, testifies that the event did not take place at such time. As already suggested, contradictory evidence may relate to but a single fact, or it may extend to a group of facts or, as often occurs in circumstantial evidence, testi-

mony of one theory in explanation of a series of facts may be set over against another theory in which it is impossible for both to be true. This class of evidence combines the two sides of a mutually exclusive situation, and the side having the more probative force displaces the opposite view absolutely. This effect may be produced when the successful matter has no probative value whatever, but is valuable in rendering positive evidence worthless. As far as the net result is concerned, both parties are left in the same position as though no positive evidence had been advanced on this particular subject. It simply leaves the case to be decided upon other grounds. Completely refuted evidence by testimonial of a purely negative character removes this whole body of evidence from the further consideration of the case. Of course this depends upon whether the refutation has firmly established its truth, if not it not only fails itself and proves its own worthlessness, but the failure to disprove actually strengthens the credibility of the positive ground. To survive a test of survivability only emphasizes the strength of the position. The result of this form of interlock is either, if the refutation succeeds, in eliminating all of this body of evidence on both sides, or, if it fails, in eliminating the refutory evidence and thus indirectly enhancing the value of the evidence assailed. Still another phase of contradictory evidence may arise when, inadvertently or through cross-examination, one side may be found to have contradicted itself. The effect of such a situation amounts inevitably to a loss upon the side where it occurs, for if the refutation is equally or more powerful than the material contradicted it will operate to cancel out both, and if not will impair the source of the weaker evidence for other purposes.

A fifth body of testimony, and usually the largest and most commonly found, is where portions only of the evidence is attacked in refutation, but not through the enforcement of an alternative or mutual exclusion between the data. The

positive set of evidence is in this interlock simply modified by further evidence which, while not entirely destroying the probative value of the former, weakens its forces. Such refutation serves to so condition, shrink or expand the facts that their application to the issue is obscured and rendered doubtful. Sometimes the attack is directed against the form or kind of argument under which the evidence is being marshaled, revealing for example no analogy where one has been attempted, or it may disclose gaps in a series of facts which are supposedly significant on account of their order, sequence or system, or again it may emasculate a theory by proposing one or more others or dissipate the weight of an induction by disclosing a number of exceptions. It can readily be seen that this body of evidence requires the closest scrutiny and gives the most trouble both to the advocate and to the jury. To sift and compare these values accurately is sometimes almost an impossibility even to the trained jurist accustomed to the entanglements of evidence. Nevertheless the skill of the advocate in summing up such material before the jury or court is often the measure of his success, for the bewildered jurymen is only too willing to follow a path in the hope of thereby reaching the open highway of reasonableness.

Finally, there often exists a considerable body of evidence which is matched and unified in an antithesis pro and con, not in a direct and refutory sense, but in support and antagonism to the issue itself. Such evidence is not mutually contradictory in fact, but only in the inferences to be drawn therefrom, and hence is neither weakening nor destructive of the evidence per se. In this form of interlock the evidence on both sides stands as a positive contribution, there being no cancellation of testimony, but only a weighing of one side against the other to ascertain which has the more probative force. In this group all of the evidence on both sides may be equally true, the evidentiary facts not being directed against the truthfulness of each other, but as to which set

of testimony contains the preponderating weight and in this manner are laid before the jury the relative values and consequent effect.

With these several distinct though not unrelated groupings of evidence estimated as separate factors the results are thereupon in a comprehensible shape to be further combined into a final decision by logically carrying the inferential consequences derived from the determination of the one or more bodies of ultimate facts upward and rationalizing all of the materials at each stage of the intermediary issues until they all unite in the support or overthrow of the primary issue. Where the case presents a series of steps of this character the advocate usually finds it important and advantageous to point the attention of the jury to such an outcome. The danger lies in not being able to sum up these effects in such a manner as to be lucid and convincing. Generally the case will not involve a complex logical series, but will hang upon one or more conspicuous and co-ordinate issues. In some civil and criminal cases the last task will be to show not merely a preponderance of the evidence, or its lack, but a convincing preponderance or a preponderance to the degree of being beyond a reasonable doubt or the opposite of these, a feat which is sometimes beset with the greatest difficulty.

CHAPTER XVII.

OPPONENT'S CASE AND NOTE TAKING.

The Defendant's Case.

What has already been said relating to the preparation necessary for the proper trial of a case applies in most particulars with no less force to the case of the defense than to that of the plaintiff. Each party should study his opponent's point of view and fully understand both its strength and weaknesses. The former will stimulate caution and the latter boldness. But the one without the other is likely to prove disastrous. The plaintiff has some advantages in that he may, to a certain extent, force the fight upon grounds selected by himself for the advantages which it presents. The process of selecting an appropriate theory as determined by an effective remedy illustrates the wisdom of adjusting a plan of attack to the possibilities of different defenses. On the other hand, the defendant is at liberty to take advantage of any mistake of the plaintiff in this connection. He in turn has the advantage of holding his adversary to the ground upon which he has elected to stand. Of course in jurisdictions where he is entitled to plead inconsistent defenses he can, in some measure, cover up the main defense upon which he relies.

Naturally the defendant should first ascertain whether his defense must be negative or affirmative or a combination of both. By the former he evades the burden of proof unless this be differently imposed by statute, while in the latter he must assume this burden. In short, a defense by confession and avoidance is a counterattack which must in turn adapt itself to the advantages and disadvantages of various de-

fenses. Primarily it denies the applicability of the rule of law adopted by the plaintiff to the facts in the case as distinguished from the facts alleged. It does not deny the truth of the facts alleged but their legal effect. It raises fundamentally an issue of the proper application of law.

Thus the defendant for purposes of trial may in some instances be compelled, and in others have the choice of adopting a positive theory, which if true renders the opposite theory of legal delinquency false. In such a defense he becomes practically the plaintiff in the case. Since however such an election of the mode of defense depends wholly upon the nature of the facts themselves, the defendant has to be very sure of his ground as based upon what he can actually prove. The strength of a negative defense will lie upon a deficiency of fact to substantiate the opponent's theory, while the strength of an affirmative defense will lie upon the sufficiency of fact to prove a theory or situation which will have the effect to ipso facto dissolve the preceding charge. The failure to make a countertheory stand will obviously leave the plaintiff's theory intact, and unless it be destroyed by its own inherent absurdity will pass to judgment. Both plaintiff and defendant therefore should be thoroughly conversant with the possibilities of each side and be equipped to be either plaintiff or defendant upon any issue which may arise during the trial. Some advocates have declared that it is more important to know the adversary's case well than to know his own, but the two are so interrelated that to know either thoroughly requires a corresponding knowledge of the other.

Nevertheless to prepare a case equally well from both sides requires of a lawyer that he be somewhat of a scientist first, and an advocate second, and it requires considerable self-control to realize the benefit of each distinct attitude in its proper place. If a lawyer upon accepting a case, too soon assumes the flush and enthusiasm of a partizan, he thereby curtails his power of dispassionate analysis and the corre-

sponding scientific estimate of values pro and con without which he is not a master of the game. It is fortunate that the lawyer at least begins his case under the limelight and clear vision of an impersonal investigator. If he does not utilize this impartial period to the full in giving both sides an impartial hearing, it is a professional mistake and largely his own fault. Yet it is easy to fall into the logical fallacy of finding what one desires to find and to be caught in the trap while under the delusion of an unbiased hearing.

Moreover, a mastery of both sides of the case should not only be scientific in spirit, but reach scientific results, that is, the lawyer should become conversant with the authorities which it is reasonable to suppose will be quoted for and against the issues. And if it be a conflict of cases he must weigh these carefully and differentiate them with the greatest exactitude when this is possible. To know the opponent's repertoire of authority better than he knows it himself is a very disconcerting factor to that gentleman's self-assurance. When an attorney is thus forearmed, he is a worthy foeman even in a cause destined to lose, for a losing battle well fought is a credit both to the lawyer and to the cause of justice, for it is meeting the expectation of the law and not infrequently, modifies materially the demands of the opposition.

Method in Note Taking.

Order should be the watchword of the advocate. Order, order everywhere. Order in the ascertainment of facts, order in the analysis of the case, order in the search for authority, order in the taking of notes, order in the conduct of the case, order in briefing the case, order in the final argument, order in the preservation of the history of the case and order in the system of office filings for future reference. Lack of system is the lawyer's greatest enemy. It loses time, it loses

cases, it loses reputation and it loses money. A prerequisite to an orderly trial in every phase is an orderly plan of note taking. The materials of trial must be collected before they can be arranged into final form, and since they come in fragments the fragments must be tentatively preserved, and this tentative stage is capable of its own orderly disposition. Such disposition should economize time and effort by obviating duplication of research and difficulty of future reconstruction of the case from unintelligible data. The final building up of the trial structure will be much facilitated or obstructed by the method in which the material is gathered and reduced in the initial investigation to orderly notes.

The Note Book.

In the first place notes should never be taken upon loose and scattered fragments of paper. To do so runs the risk of losing all or a portion, and renders them difficult to file properly, especially where the process of their collection is interrupted by other matters. Therefore a special notebook of convenient size should be provided for each separate case. To this the average lawyer will at once demur and say that such a procedure is too academic for a man of experience, but nevertheless the methods of office management in connection with law are changing rapidly toward a highly developed scientific system of departmental investigations, filings and reports. A file of case books is an economic necessity. The name and date of the case should be written upon the cover where it can easily be seen. If the leaves in this book are removable they may be removed when the notes are ready to be used as data for the brief to follow. They should always be returned to the note book if possible for future reference.

We have already discussed how the advocate, by a tentative hypothesis of what the facts are, presages an hypothesis

of law to fit the facts and by a process of correcting these two hypotheses by means of each other and through an investigation of the law and further facts finally unites the two into a definite theory of the case which he then proposes to prove by evidence. It is clear therefore that the process of taking notes begins with the field of fact, turns from that to legal authority, then back again to further fact and again to law, etc., etc., until the case is exhausted. Two distinct bodies of notes will thus be assembled: the one dealing with the facts of the case and the other with the legal authority. The one set of argumentative material will be obtained by inspection, observation and the interrogation of witnesses, the other from the primary and secondary repositories of the law, through legal learning and investigation. In the natural order of acquisition the first part of the note book should be reserved wholly for the factual material and the second half for the material of law. The process of note gathering more specifically would proceed as follows:

1. The client in the case should first be interviewed and his own story obtained as completely as possible, even in the relator's own words if the case promises to be important. It is well at the outset to let the client tell his own version of what the situation is in his own way. This should then be followed by special questions upon significant points, the questions and the answers being very definite. These results may now be sufficient as a basis for some tentative advice, and some legal investigation into their sufficiency as a cause of action. Careful notes of these facts and qualitative observations by the attorney should be at once entered in the notes.
2. The second step, that of consulting legal authorities, demands for the sake of accuracy three things: (a) That the advocate seek a precise point or points.

(b) That he seek the point under the right legal topic and heading. (c) That he reach the best and authoritative expression of the law.

To know precisely what the information sought is to elucidate, is a prerequisite to finding the law, for a vague idea may lead to many different results not apropos to the question. Nothing but a broad understanding of the law and a keen intellectual appreciation of distinctions among facts will suggest or reveal to the advocate a definite clue to be investigated. Only the trained mind will detect in the data presented the traces of illegality. The layman can not and does not realize the exactitude of the law respecting legal instruments, nor the significance of human actions in conferring or waiving legal rights, as these things are essential to any system of justice. Moreover the limitations imposed by law in the field of evidence are a profound mystery to the uninitiated. Thus the field of law is a labyrinth which can only be penetrated successfully by knowing definitely what circumscribed point is being sought. Such point or points should be clearly stated in the form of propositions as topical headlines in that part of the note book reserved for legal material.

It is presumed that the lawyer is well acquainted with the devices employed by the various publications of law to direct him to the object of his search, but even then it is essential that he select the proper topic or headline under which the particular material is usually treated in law publications. Sometimes he can find the exact discussion by following out principles of law, and at other times it is more easily found by recourse to the descriptive words which seem pertinent to the case. So too when he has in mind or finds a leading case upon the subject he may be greatly aided by a citation or by finding from the table of cases in a text book where such case is cited and the question discussed. Practice and

familiarity with book construction will aid materially in the art of finding the law.

When once on the right track the investigator should never be satisfied until he has sifted the matter to the bottom, and this means to the original source. For example, he should never be satisfied with the mere syllabus quoted in some digest, or even at the top of a report, but read the report to get the exact words of the court, or if it be a statute whose interpretation is vital to the issue he should never stop short of reading the language of the original draft. Secondhand is, at best, but secondhand, and an original perusal is certainly an invaluable asset to confidence and ultimate success.

"The most common defect I have observed in the argument of causes", says Judge Dillon, "next to faulty statements, is the misuse of reported cases. No lawyer is justified in citing a case in his brief which he has not carefully read and studied".²

Having found the material sought or material bearing upon the question, the process of transcribing to notes begins. But what shall be taken? Here the selective judgment must compare and weigh. One rule, however, is inviolable, the material taken down must be valued at the time and in conjunction with its context and this estimate be made a commentary upon the note. To abstract a point with the purpose of setting a value upon the same later, or with the expectation of remembering its peculiar quality will end later in either putting a false value thereon or of looking it up again or of relegating it to the rubbish heap. Material of a crucial character should be quoted if not too extensive or syncopated with omissions of less important parts with great care in so doing not to change the import. If less important, phrases which are catchy and suggest the quality may be used. Exceedingly important, however, should be the commentary upon the case or discussion as it may happen to be. Such

²1 Columbia Jurist 126.

significant terms for example as "misleading syllabus", "not decided on point", "poorly argued", "divided court", "no opinion", "doubtful", "splendid annotations", "contrary holding", "overruled", "obiter dicta", "strong case", "study carefully", "look up in citator", "criticised", "not convincing", "under special statute", "excellent", "a good finish to the argument", "brings out opponent's error", "dangerous exception", "couple this with case of, etc.", "too long to quote", "a fine summary", "from Justice Shaw", etc., are invaluable when attached to an authority. Moreover, the exact location of the material should never be omitted even to a specification of its approximate position on the page where it occurs, for all this, especially with important material, will later save much time.

In so far as possible also the work should be done so carefully the first time that the approximately true values may be indicated by the notes and the latter thoroughly relied upon. When once cold the notes are likely to inspire a fear that they were carelessly made and prompt a second unnecessary incursion, especially where the advocate has not made a habit of being careful. So also the materials during the process of accumulation should be somewhat roughly classified into groups of similar material. When done the results will be topically arranged. The art of quickly improvising topic heads to so pigeonhole data in process of collection will be found of great assistance in the later reorganization of materials. Little time is gained in extricating matter from one confused situation only to throw it into another.

When the first data of fact has been worked out satisfactorily in the legal field it is probable that the advocate has something definite to report to his client, if it be no more than to call him up for further examination. If the cause of action seems now somewhat certain it may occur that further facts are needed to determine whether there may be more

than one cause of action, or whether one remedy may not be better than another. If so, the note book is again brought into service, the plaintiff together with his witnesses are summoned and the advocate secures a further supply of factual material looking toward these particular ends. When these items of detail are obtained and entered with the same degree of care the search again turns to the question of law. By such interactionary process a note book supplying the data at hand for further search and revision, the case is at length brought to a fullness of both fact and law. The materials are now gathered and tentatively arranged as already described in the very process of the taking down, and are hence now ready to be organized by briefing methods into a systematic whole. But it must not be inferred that research is now at an end. Far from it, for when the defendants pleading is filed and the issue joined and analysis has disclosed upon what issue the battle line will be drawn there may still remain issues of law respecting the introduction of evidence and the conduct of the trial which may wisely be anticipated and prepared for. Then too there will remain the issues of fact which must be supported by evidence, and hence the search for law and actual evidence will continue throughout the trial. At every stage the note book will be the lawyer's constant companion, although the trial brief will now have become the finished authority on both detail and method.

CHAPTER XVIII.

STEPS AND RULES IN PREPARATION FOR AN APPEAL.

Order of Steps.

In contrast to a strictly logical procedure there exist certain legal steps in the process of preparing for an appeal. These steps, together with the rules of the court appertaining thereto, are necessarily matters of practice differing in different jurisdictions upon the question of detail according to the custom of the jurisdiction which must be learned through special inquiry. However there exists sufficient uniformity to give the inexperienced advocate a general idea of the procedure.

The first step consists in laying a legal basis for an appeal upon the record, and this requires that errors to be relied upon in case of an appeal must be made a part of the record by an exception properly taken. Most courts require that such exceptions must be specifically asked for and that an objection overruled is not within itself sufficient and also that such exception must be taken at the time that the objection is overruled, although there is a practice in some jurisdictions, through a preliminary understanding between the court and counsel, that all objections overruled shall be considered excepted to for the purpose of economizing time. The advocate, however, can not claim such a privilege as a matter of right, the same lying wholly within the discretion of the court. Exceptions to the instructions of the court must be taken before the jury leaves the box and a decision is rendered. A verdict or judgment once rendered is very difficult to get opened up, since the principle of *res judicata* or twice in jeopardy are at once operative.

The following exceptions are sometimes deemed to be taken:

1. Decision in making an order.
2. To the verdict of the jury.
3. Order sustaining or overruling a demurrer.
4. Refusal of leave to amend a pleading.
5. Order made in the absence of the other party.

A bill of exceptions must set forth and contain whatever is necessary to the understanding of them, involving when necessary questions and answers.

The next step is usually to ask for a stay of execution and sometimes also of the entry of judgment for the purpose of making a motion for a new trial. The period of from thirty to ninety days is almost always granted. The court may or may not inquire if the request will be taken to include notice of intent to move for a new trial. It is generally included. Should the time prove too short, appearance may be made *ex parte* and a request be made for more time, but if the request be delayed until after the expiration of the allotted time, then an affidavit must be filed and notice given.

The Conditions of a New Trial.

1. A new trial is the re-examination of an issue of fact tried by a jury, court or referee by the same court.
2. Grounds for a new trial are usually as follows:
 - (a) The most common are the errors excepted to in the bill of exceptions and evidence insufficient to justify a verdict.
 - (b) The somewhat unusual are such grounds as that of irregularities during trial, excessive damages, unavoidable surprise or accident, newly discovered evidence, the two latter needing the support of an affidavit.
3. The notice of intention to move for a new trial must state the grounds, and that said motion will be

based upon a bill of exceptions, a statement of the case, the minutes of the court, or affidavits hereafter to be filed.

It is next necessary that the bill of exceptions shall be presented, settled and allowed. The following rules stating the procedure adopted by the circuit court for Lane County, Oregon, are an example of the requisites of this step.

Rule 1. That all bills of exceptions for an appeal shall be presented, settled and allowed during the term of court in which the judgment to be appealed from was rendered, or within such further time as may be allowed by the court by order entered in the journal.

Rule 2. That when the time for presenting, settling and allowing a bill of exceptions is extended beyond the term of court at which the judgment was rendered, the proposed bill of exceptions, or a copy thereof, shall be served upon at least one of the counsel for respondent, who shall have five days in which to prepare objections thereto, and said objections, if any, and proposed bill of exceptions, with proof of service attached thereto, shall be forwarded to the judge of this court for settlement and allowance.

Rule 3. No bill of exceptions shall be allowed except in accordance with the above rules, unless for good cause shown.

It is hardly necessary to add that proper notice of an appeal must be given and undertakings be provided which are in accord with the particular statutes of the jurisdiction. Sometimes confusion is made between an undertaking required to perfect an appeal and one necessary to a stay of execution.

Legal Data Involved Upon Appeal.

1. Minutes of the Court: Minutes left by the clerk and sometimes the stenographer's notes may be included.

2. Judgment Roll: Includes the pleadings, orders and judgment.
3. The Court Record: Pleadings, filing, orders, exceptions, judgment and execution.

A. RULES OF LAW RESPECTING APPEAL BRIEFS.

1. All appellate courts either by rules of the court or by statute require briefs to be filed in addition to the regular transcript. These briefs are entitled respectively "Brief of Appellant and Brief of the Respondent or Appellee", and such briefs are ordinarily three in number, to wit, one on complaint, one on answer and one in reply.
2. The presentation of briefs can not be dispensed with by stipulation of the parties. In *Lehigh Coal & Iron Co. v. Scallen*, 61 Minn. 63, 63 N. W. 245, the court said, "A stipulation by attorneys by which they agree to submit the case upon the record is not endurable."³
3. Sometimes a supplemental brief may be offered but can only be filed by consent of the court, and if filed without that consent will not be considered. However, sometimes permission is obtained of the court to file additional authorities, but this does not authorize a new brief.⁴

B. THE SERVICE AND FILING OF BRIEFS.

Rules of the appellate court or statute usually provide for the service of briefs by requiring copies to be delivered to the opposite party and copies to be filed with the court. When this is violated it is cause for continuance, dismissal of the case or affirmation of the judgment.

1. The above rules may be enforced by litigants.⁵

³ *Disse v. Frank*, 52 Mo. 551.

⁴ *Detroit United R. Co. v. Nichols*, 165 Fed. 289; *McDonald v. Logi*, 143 Ill. 487, 32 N. E. 423; *Cross v. Atchinson, &c., R. Co.*, 141 Mo. 132, 42 S. W. 675.

⁵ *McCabe v. Healey*, 139 Cal. 30, 72 Pac. 359; *Shain v. Peoples Lumber Co.*, 98 Cal. 120, 32 Pac. 878; *Baubletts v. King Park Amusement Co. (Mo.)*, 81 S. W. 1179; *Maddin v. McCormick*, 27 Okla. 778, 117 Pac. 200.

2. The time and manner of filing briefs are also provided by the courts and enforced, but with penalties varying in different states. In the United States Supreme Court the brief must be filed six days before the case is called for argument, but after argument orally a brief may be filed only within the discretion of the court.⁶ Nor can additional time be secured when the court is satisfied nothing will be gained.⁷ In the states the regulations vary somewhat, the state of Iowa as an example requires appellant's brief filed thirty days before date assigned for a hearing; respondent's brief filed ten days before date of hearing; reply brief filed three days before date set for hearing.
4. Courts in general are liberal in extending time upon proper excuse.⁸
 - (a) Too much work not a good excuse.⁹
 - (b) Fault of the printer doubtful.¹⁰
5. A brief filed is equivalent to appearance of the maker in appellate court.

C. THE ATTITUDE OF THE COURT.

1. The appellate court holds itself to have the liberty to consider the merits of the question independent of the briefs, if it so chooses, but its custom and preference is not to do so.
2. The court holds itself bound to settle an appeal on points brought out in the original briefs alone, even when new points are added or have been reserved for the reply in such case holding such points waived. Where such objection has been raised by respondent the court has held the objection good.¹¹

⁶ *Pennsylvania R. Co. v. St. Louis, &c., R. Co.*, 116 U. S. 472, 29 L. ed. 696.

⁷ *Matsumura v. Higgins*, 187 Fed. 601.

⁸ *People v. Mora*, 50 Cal. 468; *Merchants Nat. Bank v. McKinney*, 1 S. Dak. 78, 45 N. W. 203.

⁹ *Smith v. Tenney*, 60 Ill. App. 442.

¹⁰ *Neppach v. Jones*, 28 Ore. 286, 39 Pac. 999, 42 Pac. 519; *Ussery v. Vogel*, 36 S. Car. 603, 15 S. E. 512.

¹¹ *Phelps v. Mayer*, 126 Cal. 549, 58 Pac. 1048; *Kahn v. Wilson*, 120 Cal. 643, 53 Pac. 24; *Webber v. Clark*, 74 Cal. 11, 15 Pac. 431; *Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713.

3. The court does not hold itself bound to search for authorities to substantiate statements made in briefs nor to assist the party in default.¹²
4. The court does not hold itself bound to review the rulings of the lower court on the admission or rejection of testimony when omitted in the brief.¹³
5. An unfair statement is certain to be discovered and affects the force of the entire brief.¹⁴
6. The court holds that no question for their consideration is presented unless the matter in question is set out in substance or *haec verba*, of evidence, instructions or questions of law in the brief.¹⁵
7. The statement of the briefs will be assumed to be accurate and sufficient for a full understanding of the question unless the opposite party in his brief shall make necessary corrections and additions.¹⁶

D. FORM AND CONTENTS OF THE BRIEF.

In *Bell v. Germain*, 12 Cal. App. 375, 107 Pac. 630, the court says, "A brief is supposed to be the vehicle of counsel to convey to the court the essential facts of his client's case, a statement of the questions of law involved, the law he would have applied, and the application he desires made of it by the court."

1. Only facts inside of the record should be discussed in the brief. "It is not only improper practice, but a waste of time of counsel and the court to attempt to inject into briefs a discussion of facts outside the record."¹⁷
2. Mere statement of opinion of counsel that the record does not fairly set out the facts is improper.¹⁸ In *Haberlau v. Lake Shore &c. R. Co.*, 73 Ill. App. 261, the court even affirms that in such case the

¹² *Western Tube Co. v. Paderson*, 128 Ill. App. 637.

¹³ *Benites v. Hampton*, 123 U. S. 519, 31 L. ed. 260.

¹⁴ *People v. White*, 176 N. Y. 331, 68 N. E. 630.

¹⁵ *State v. Lukins*, 43 Ind. App. 341, 87 N. E. 246.

¹⁶ *Schreiber v. Worm*, 164 Ind. 7, 72 N. E. 852.

¹⁷ *Chicago, &c., R. Co. v. Chicago Mech. Inst.*, 239 Ill. 197,

87 N. E. 933.

¹⁸ *Briggs v. Milburn*, 40 Mich. 512.

court is warranted in affirming the judgment without examination of the merits.

3. The opinion of counsel of the legal effect of instructions of the court, without giving the instructions themselves, is bad. The court in *Henderson v. Henderson*, 165 Ind. 666, 75 N. E. 269, was as follows: "In testing instructions, the legal effect is to be determined by the court from the language used and not by the opinion of counsel."
4. Counsel must not criticise the court nor opposing counsel nor scandalize in any way in a brief. If so, such brief will be stricken from the files or the offensive matter may in the discretion of the court be stricken out.¹⁹
5. Courts or statutes generally require briefs to be printed or typewritten in black ink and, unless there is a strict compliance, will not be considered. If printing is specified typewriting will not do and faded typewriting will be rejected.²⁰

¹⁹ *Cramer v. Tittle*, 79 Cal. 332, 21 Pac. 750; *Scroggin v. Brown*, 14 Ill. App. 338; *Sax v. Drake*, 69 Iowa 760, 28 N. W. 423; *Cassidy v. Palo Alto*, 58 Iowa 125, 12 N. W. 231; *Schleissner v. Schleissner*, 72 App. Div. 492, 76 N. Y. S. 577; *Mann v. Hefter*, 128 N. Y. S. 663; *White v. White*, 34 Ore. 141, 50 Pac. 801, 55 Pac. 645.

²⁰ *Sanborn v. Robinson*, 22 Mich. 92; *Collart v. Fisk*, 38 Wis. 238. Rules of the United States Court are set forth in *Wisconsin &c., R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194; *Carroll v. Holmes*, 19 Ill. App. 564; *Heath v. Hall (Tex.)* 27 S. W. 160.

CHAPTER XIX.

THE LEGAL BRIEF.

Preliminary Considerations.

The brief is a special form of outline used extensively in the practice of law on account of the fact that it is adjusted to the needs of a controversial subject-matter. This especial adaptation to argumentative discourse results from the aim of a brief to set out and emphasize the inferential relations between propositions employed in argument.

In this way it differs from an ordinary outline which merely attempts to arrange ideas in a systematic order and permits the relations among such ideas to be implied from position. The outline is therefore merely a process of setting out things related while the brief, on the contrary, is a process of setting out explicitly the relations among things. However, the brief in its perfect form deals only with argumentative relations, and hence only with inferences between propositions. Nevertheless some modification should be made to the last statement. While a brief deals primarily with a course of reasoning in which one proposition is proved by another or a series of propositions, yet to render such process more obvious it finds it expedient to prefix an introduction consisting in form of a simple outline of an expository character.

Thus, correctly speaking, a brief is a combination of an ordinary outline for introductory purposes, succeeded by a special form of outline fitted to the particular work of setting out the sequential hinges of an argument, and completed by a summary of the second part. Within this sphere of utility there arise at least three distinct varieties of the legal brief, namely, the court brief, jury brief and appeal brief. Each of these will receive a detailed consideration in

the order named. But before proceeding to such a discussion it is important to note a further form of outline which partakes of the nature both of a general outline and a species of brief, and which is usually called a trial brief. Yet its function is to set out a process of legal procedure rather than that of a process of argument, although the trial process is, within itself, a form of legalized controversy as well as an argumentative battle. The importance of such an instrument of form at once becomes apparent, and consequently deserves a very careful exposition to which we first address our attention.

The Trial Brief.

The trial brief is the most general and comprehensive outline employed by the lawyer. Its broad purpose is to furnish a chart to direct the process of litigation from its inception to its close. Thus it properly includes the steps leading up to trial, and also the process of appeal thereafter. In so comprehensive a scope it may be said to logically include, when they arise, any or all of the three species of briefs already mentioned. Of course it is seldom that the latter are made incorporated parts of the brief because they are usually of sufficient importance and length to justify separate instruments. As a whole the trial brief serves the double purpose of a program by which to conduct the legal controversy and a complete historical repository and file of the case for possible future references. As such it becomes an invaluable document.

The advantages of such a map can not be overestimated. There should be no need to argue the value of system. To depend upon loose and disconnected notes during the heat of conflict means inevitably to overlook sooner or later some vital factor at a critical moment. Even when if possible, through long training or an extraordinary memory, it is unnecessary

to consult a brief in order to preserve the highest efficiency, yet the very fact of having prepared one is the best guarantee of not requiring its services. There is no better plan of preparing the mind to work independently than to thoroughly prepare references. For the beginner the practice is indispensable for record purposes. With such a brief as a repository of data, the problem of preparing a final appeal brief is much simplified.

The success of a trial brief, however, is conditioned greatly upon the skill with which it is drawn. Almost every lawyer will in the course of time evolve some sort of a habit of note taking which he considers sufficiently adequate, but in many instances there is a woeful lack of system and efficiency. To be sure this brief need not be so technically perfect in form as is necessary in the case of the court and appeal briefs, since it is neither required by law nor by the court and intended solely for the benefit and use of the maker himself. And yet it is better for an attorney to develop a definite system and to adhere to the same method in successive cases, for the plan adopted will become more workable the more uniformly it is followed and the more habitual in consequence its form becomes.

It is obvious that an outline covering a field capable of such endless variation as that prescribed by the boundaries of litigation must be of a very general nature, but little more than a series of suggestive headings being capable of enough flexibility and modification to be adjustable to the particular case as it arises and develops during the process of litigation. A very peculiar and important phase of this brief is that it is in the process of making during the entire course of the controversy. The court, jury and appeal briefs are constructed and completed in advance of their service, but this form of outline is only in part anticipatory, provision not merely being made for what the maker intends to do, but also for recording in the proper place what both the court

and the opposite party may do. The latter record will as a matter of necessity have to be filled in during the progress of the trial.

THE GENERAL SCHEME.

Three cardinal factors must be interwoven in the construction of the trial brief, namely, the order of procedure, the law and the facts. The first naturally furnishes the most fundamental basis for the main divisions of the outline. In the order of time, as well as according to well defined stages, the process of litigation falls into two parts, to wit, that taking place before issue joined and that occurring after this point. The brief may therefore be logically separated into the two following divisions: before issue and after issue, respectively. The second factor, namely, law, resolves itself into three phases, namely, the principles of law, the authority and the rulings of the court with the exceptions taken. Finally, the third factor may be subdivided into four considerations respectively: the classification of facts, the specification of facts, the order of evidence and the sources of testimony.

With the order of procedure predominating, the problem of this brief becomes the task of weaving together these materials according to the consecutive order and place in which they are needed during the litigation. The following suggestion may prove of service in such connection.

PART BEFORE ISSUE.

This division will obviously contain whatever preliminary skirmishes of law may arise in connection with the pleadings or original process. Following the order of their filing the outline should provide a heading for the summons, complaint, answer, reply, etc., under which may be considered

the theory of the case as revealed by both complaint and answer, the attacks and defenses made upon the legality of the process and pleadings, together with authorities cited and the rulings of the court and exceptions taken. Finally, the issues essential to the proof of both the plaintiff's case and the defendant's case should be carefully stated. This involves a clear appreciation of what the opponent has in view and what is necessary for him to show, as well as the maker's own case. So also in determining issues it will logically follow that certain materials will be cast aside as immaterial or irrelevant or admitted and appropriate headings should be provided where these bodies of fact may be systematically and conspicuously grouped together.

For the purpose of completeness space should be allowed under the appropriate headings for a full quotation of motions, demurrers and pleadings, especially where amendments have been made. Liberal space must also be allowed for the citation of authorities, and where highly important the most convincing cases should be quoted verbatim in particular parts, care being exercised not to weigh the brief down with unnecessary lumber. It may occur also that a question of law of sufficient importance to justify a separate brief may arise in this section of the outline, and in some instances it may be incorporated for the purpose of preservation by attachment. A serviceable method for adding supplementary material of whatever kind is easily obtained by constructing the brief in book form and reserving a blank page opposite to each page of outline for surplus references and comments.

PART AFTER ISSUE.

The part of the brief relating to materials "after issue" is largely determined by the needs of the trial process. It therefore opens by setting forth explicitly the exact issues which must be tried as settled formally by the pleadings or

by stipulation. Again, any material of a dangerous nature, whether immaterial or irrelevant, demands proper reference to prevent its intrusion into the case. In addition to these matters a special note of any elements which must be proved in order to comply with the requirements of statute should always be made. So also in cases where presumption or presumptions are involved and the burden of proof is established by law or shifted by a certain amount of evidence a careful record should be made of the situation.

Next in order will follow the introduction of evidence, and associated with this, the exclusion of evidence, for it is manifest that the plaintiff's and the defendant's briefs will at this point become the reverse of each other, that is, the plaintiff's program "after issue" will consist of two stages: the first in which he presents the positive side of his case, and the second in which he assumes a negative attitude in defending against the introduction of evidence by the defense. Conversely, the program of the defendant will be, first, to resist the introduction of positive evidence by the plaintiff, and, secondly, to present his own case in rebuttal or positive defense. Bearing these facts in mind an epitome should be inserted in the brief of whatever evidence is crucial to the case and of how its insertion or rejection can best be sustained by authority. The general order of the evidence should next be indicated, and through what witnesses the particular testimony is to be given. Where corroboration is of peculiar significance the proper provision for calling it to mind at the required moment should not be overlooked. In completion of the plaintiff's positive case, and in anticipation of a possible motion to direct a verdict, there should be appended a very brief summary of what has been proved and why it constitutes a *prima facie* case. The defensive part of the plaintiff's trial work now merits attention. Here it is obvious should be noted such facts as the plaintiff must if possible exclude from the records, and although they be an-

ticipatory should be well investigated and fortified with authority. Naturally evidence of a rebuttal character as well as such crucial evidence which gains entrance in the face of opposition should be marked out for a most severe cross-examination grilling.

Usually it is advantageous to provide a heading for general objections, some of which may be anticipated and others not, but of such a general nature as not to follow normally from the ordinary rulings of the court. So too instructions which are to be requested to be made to the jury should be most carefully written out and made a part of the brief, although the greatest care should be exercised to insure a perfect duplicate of what is presented. A record of the verdict and any notice served of an intention to take further action, together with a motion for a new trial and reasons therefor, naturally demand a place in the conclusion of the brief. All exceptions to the rulings of the court should be recorded when made, and great vigilance should be maintained to so amend and supplement the brief as the trial proceeds, that the outline shall be a perfect record of what actually occurs. Especially should anticipated material which has failed of materialization be accurately canceled. And in conclusion, when advisable, the jury brief and appeal brief may also be attached to the outline so that the trial brief may then be filed away as a complete historical record of the case.

What has been said applies with equal force and application in the preparation of the defendant's brief, varying only as the point of view is reversed and the order of trial necessarily partially reversed. Any further difference will appear plain from the sample outlines which are now inserted. As it has already been stated, the trial brief should be made to suit the case rather than to force the case within a fixed form, and yet the outlines here suggested are of such a general nature that no great difficulty, it is apprehended, will

be met in applying them to the general run of cases. While the point of view has followed the needs of civil cases, still by proper modification they will serve equally well the requisites of criminal procedure. Of course a lawyer must not become a slave to a system of notes. They are made chiefly to prepare his mind with a definite program and to preserve the case once made up from the mental waste of energy occasioned by unexpected and long delays. No lawyer can carry in his memory the details of numerous cases at one and the same time and in different stages of completion without the assistance of a written record. The degree of fulness of a trial brief will depend upon the nature of the case itself. Some are relatively simple while others may be exceedingly complex.

OUTLINE OF TRIAL BRIEF.

THE PROSECUTION.

Before Issue:

- I. Title of Case.
- II. Theory of prosecution as expressed in complaint or declaration.
 - (a) State issue or issues to be proved.
- III. Issuance and service of original process or summons.
 - (a) Return day.
 1. Appearance.
 - (1) In person or by attorney.
 - (2) Kind—General or special.
- IV. Answer.
 - (a) Defense against motion to quash.
 1. State whether of form, content or service.
 2. State possible defect.
 3. Cite authority.
 4. Ruling of the court.
 - (b) On plea to the jurisdiction of the court.
 1. Reasons why court has jurisdiction.
 - (1) Cite authority.
 - (2) Ruling of the court.

- (c) On plea in abatement.
 - 1. To person of plaintiff.
 - (1) Cite authority.
 - (2) Ruling of the court.
 - 2. To person of defendant.
 - 3. To the declaration, count or complaint.
- (d) Demurrer.
 - 1. Grounds of.
 - (1) Authorities upholding declaration or complaint.
 - (2) Ruling of the court.
- (e) Motion to strike out.
 - 1. Authorities upholding declaration or complaint.
 - 2. Ruling of the court.
- (f) Motion to make more specific.
 - 1. Authorities upholding declaration or complaint.
 - 2. Ruling of the court.
- (g) Answer proper.
 - 1. General denial.
 - 2. Answer setting up affirmative matter as defense.
 - (1) Examination of answer.
 - a. Defect, if any, met by what method—motion, demur or reply.
 - b. State defect.
 - c. Quote motion, demur or reply.
 - d. Cite authority in order of statutes, decisions, encyclopedias, textbooks.
 - e. Ruling of the court.
 - (2) Theory of fact set up in reply.

After Issue:

Affirmative Side of Case.

- I. Final admitted matter.
- II. Restatement of issues.
- III. Irrelevant matter.
- IV. Crucial evidence to be included.
 - (a) Authority to resist objection.
 - (b) Ruling of court.
- V. Points to be established by particular witnesses.
 - (a) Witness A, B, C, etc.

- VI. Motion to direct a verdict or nonsuit.
 - (a) Ruling of court.

Defensive Side of Case.

- I. Crucial evidence to be excluded.
 - (a) Authority.
- II. Points to be grilled on cross-examination.
- III. Rebuttal evidence.
- IV. Instructions to be requested.
 - (a) Exact wording.
 - (b) Ruling of court.
- V. General objections.
- VI. Verdict of jury.
- VII. Motion for a new trial.
 - (a) Ruling of court.

OUTLINE OF TRIAL BRIEF.

THE DEFENSE.

Before Issue:

- I. Title of case.
- II. Examination of original process.
 - (a) State whether defect or form, content or service.
 - (b) State defect.
 - (c) Cite authority to sustain.
 - (d) Ruling of the court.
- III. Examination of the complaint.
 - (a) Theory of prosecution as disclosed by complaint.
 - (b) Issues to be proved.
 - (c) Defect, if any, met by what method—motion, demurrer or answer.
 - (1) State the defect.
 - (2) Quote the motion, demurrer or answer.
 - (3) Cite authority in order of statutes, decisions, encyclopedia, text books.
 - (4) Ruling of the court.
- IV. Theory of the case as to facts set up in the answer.
 - (a) Issues to be disproved.
 - (b) Issues to be proved by way of counterclaim or avoidance.
- V. Examination of reply.
 - (a) Defect, if any, met by motion or demurrer.
 - (b) State defect.

- (c) Quote the motion or demurrer.
- (d) Cite authority in order.
- (e) Ruling of the court.

After Issue:

(Reverse of same part under prosecution. See previous page.)

ILLUSTRATION I.**TRIAL BRIEF—THE PLAINTIFF.**

IN MOOT COURT—COLLEGE OF LAW.
JOHN JONES V. CITY OF VERMILLION.

Before Issue Joined:

- I. Defense Against Motion to Quash and Dismiss:
 - (a) Of form, content or service: None.
 - (b) Possible defect: None apparent.
 - Outcome.*
 - (c) Cite authority.
 - (d) No defect raised.
 - (e) Ruling of court: None.
 - (f) Exceptions taken: None.
- II. Theory of Plaintiff as Expressed in the Complaint:

That it was and is the duty of the city of Vermillion based upon a statute to keep its streets safe for public travel and that it violated said duty by permitting a sewer upon its main street to remain without barricades or light signals after nightfall, as a result of which negligence an animal of the plaintiff received injuries which caused the plaintiff to suffer damages to the amount of thirty dollars.

 - (a) Issue or Issues to be Proved:
 - (1) That it was the duty of the city to put out light signals.
 - (2) That an open sewer was left after nightfall without light signals.
 - (3) That plaintiff's animal fell into said ditch.
 - (4) That said animal was a sucking colt.
 - (5) That said colt had to be killed because of the accident.
 - (6) That the loss amounted to thirty dollars.

- (7) That plaintiff presented a claim for said damages to the city council and was refused payment.
- (b) On plaintiff's motion: Plaintiff asks permission of the court to amend his complaint by inserting the word "negligently" so that the complaint read, "that defendant negligently left the ditch open," etc. Not contested.
- (c) On defendant's motion or demurrer: Complaint demurred to on ground of not stating facts sufficient to constitute a cause of action in that no allegation is made of proper demand upon city council nor of refusal by the same, nor that the statute imposing said duty is especially pleaded. Not contested.

Outcome.

- (d) Rulings of court:
 - (1) Permission to amend and insert the word "negligently" granted.
 - (2) Demurrer sustained.
 - (3) Permission to amend granted.
 - (e) Amended form, attach pleading.
 - (f) Exceptions taken: None.
- III. Examination of the Answer:
- (a) State defects: Defendant fails in his pleading to admit that no barricades were put up. [Such fact was admitted by prearrangement.]
 - (b) Motion, demurrer or reply: Plaintiff moves that such admission be made a part of the pleading. Not contested.
 - (c) Authority cited: Copy of admitted facts.

Outcome.

- (d) Ruling of court:
 - (1) Motion to amend granted.
 - (e) Exceptions taken: None.
 - (f) Amended form, attach pleading.
- IV. Theory of Defense as Revealed in the Answer:
- That the city of Vermillion was not supervising said work and was not therefore responsible and that the plaintiff was negligent in allowing a colt to be following behind and that the plaintiff was, in so doing, violating an ordinance against animals running at large upon the public streets.

V. Reply:

None filed. All allegations in the answer not otherwise admitted are deemed by law to be denied.

After Issue Joined:

Positive Side of Plaintiff's Case.

- I. Final Admitted Matter:
 - (1) That a contractor was employed by the city to construct the sewer.
 - (2) That no barricades were put up.
 - (3) That the plaintiff was driving along said street after dark.
 - (4) That said colt was not tied in any way to the team or wagon.
 - (5) That a city ordinance against animals running at large does exist.
 - (6) That there is a statute making cities responsible for the safety of the public streets.
- II. Restatement of the Issues:
 - (1) Was the city liable for the safety of its streets.
 - (2) Was it under obligation to put up lights over the said excavation?
 - (3) Did the colt become injured because of such negligence?
 - (4) Was the killing of the colt a necessity?
 - (5) Did the damages amount to thirty dollars?
 - (6) Did the plaintiff in not having the colt tied violate a public ordinance?
- III. Irrelevant Matter:
 - (1) That the night was not dark.
 - (2) That the lights of the hotel nearby were casting a light over the street.
 - (3) That the plaintiff was intoxicated.
 - (4) That the colt should have been weaned before said date.
- IV. Crucial Evidence to be Included:
 - (1) That a statute imposes a duty upon the city to keep its highways reasonably safe. [Really judicially noted.]
 - (2) That a certain sewer upon a prominent street was left dangerously exposed without lights after nightfall.
 - (3) That plaintiff's animal fell therein, broke its leg so that it had to be killed.
 - (4) That plaintiff made a proper demand and was refused damages.

V. Facts to be Established by Particular Witnesses:

(a) Witness A—John Jones—Farmer.

- (1) Time and place of incident.
- (2) Driving of the team.
- (3) Character of the team, wagon, etc.
- (4) Description of the colt.
- (5) Where driving when accident occurred.
- (6) Location of the sewer.
- (7) Absence of lights and barricades.
- (8) Nature of the accident.
- (9) Assistance rendered by S. E. Brookman.
- (10) Nature of the injury.
- (11) Effect of the accident, killing of the colt.
- (12) Value of the colt.

(b) Witness B—City Auditor—S. E. Brookman.

- (1) That he was returning from a lodge meeting on said night.
- (2) That he was called to assist John Jones.
- (3) Corroborates kind of ditch, lack of lights and barricades and nature of the accident.
- (4) That he keeps possession of the city documents, papers, etc.
- (5) That exhibit marked A is a copy of a claim for damages presented by plaintiff to the council.

VI. Objections to the Introduction of Evidence:

- (1) Objection that question of the effect of the accident calls for expert testimony and no proper foundation has been laid, also for a conclusion of the witness.
- (2) Objection to testimony of the value of the colt calling for a conclusion of the witness and no proper foundation laid for expert testimony.
- (3) Objection to introduction of exhibit A on ground that the original is the best evidence.

(a) Authority cited:

- (1) Defended that a conclusion of fact is not expert evidence.
- (2) Defended that a farmer is qualified to give an opinion as to the value of a horse.

- (3) Defended that a certified copy is admissible where the original can not be easily obtained.

Outcome.

- (b) Rulings of Court:

(1) Sustained.

(2) Overruled.

(3) Overruled.

- (c) Exceptions taken to (1), (2) and (3) by plaintiff and defendant respectively.

VII. Motion to Direct a Verdict—By Defendant.

- (a) Summary of plaintiff's case:

(1) Admitted that a statute imposes care of the streets upon the city.

(2) Admitted that a contractor was employed by the city to construct sewers.

(3) Proved that the street contained an open ditch without lights or barricades after nightfall.

(4) Proved that plaintiff's property was injured in said ditch.

(5) Proved that damage amounts to thirty dollars.

- (b) Motion for dismissal without prejudice: None.

Outcome.

- (c) Ruling of court.

(1) Motion to direct a verdict overruled.

- (d) Exceptions taken: None.

Negative Side of Plaintiff's Case.

VIII. Crucial Evidence to be Excluded:

(1) That plaintiff was driving recklessly.

(2) That the colt was separated from the dam and traveling in front or behind.

(3) Irrelevant matter.

(4) That the colt was weaned or should have been.

(5) That a veterinary was not consulted.

(6) That a broken leg does not necessitate destruction of a colt.

IX. Rebuttal Evidence:

(1) The fact that plaintiff had purchased a jug of whisky objected to and offset by testimony that it was for a neighbor.

- (2) The fact that the colt was not tied rebutted by evidence that it was alongside.
- (3) The testimony that the contractor had ordered lights put up offset by evidence that the order was not obeyed.
- (4) The testimony that a veterinary was not called offset by the fact that the local veterinary was away on a trip.

X. Points to be Grilled on Cross-Examination:

- (1) That plaintiff had been drinking.
- (2) That the plaintiff was driving recklessly.
- (3) That a barricade had been put up at the end of the street at the first crossing.
- (4) That plaintiff drove over and paid no heed to this warning.

XI. Objections to the Introduction of Evidence:

- (1) As to kind of driving, irrelevant.
- (2) Relating to a jug of liquor, irrelevant.
- (3) Intoxication of the plaintiff, irrelevant.
- (4) As to kind of night, irrelevant.
- (5) As to lights in a hotel, irrelevant.
- (6) That the colt was weaned, irrelevant.
- (7) That the colt was away from the team, irrelevant.
- (8) That a veterinary was not called, irrelevant.
- (9) That a broken leg may be restored, conclusion.

Outcome.

(a) Rulings of court.

- (1) Sustained.
- (2) Overruled.
- (3) Overruled.
- (4) Sustained.
- (5) Sustained.
- (6) Overruled.
- (7) Overruled.
- (8) Overruled.
- (9) Sustained.

(b) Exceptions taken on (2), (3), (8) by plaintiff.

XII. Instructions to be Requested for the Jury:

- (1) That where a city is duly incorporated, it is its duty to keep the streets in a safe condition for travel, and where accidents occur through the negligence of the city to keep the streets in a safe condition for travel it is liable in

damages for all injuries resulting even where there is no statute imposing such duty. Authority: *Manchester v. Ericsson*, 105 U. S. 347, 26 L. ed. 1099; *Ludlow v. Fargo*, 3 N. Dak. 485, 57 N. W. 506; *Gibson v. Preston*, 5 Q. B. 217.

- (2) That negligence is a question of fact for the jury to decide and that an open cavity in a street left without lights or barricades after nightfall is negligence. Authority: *Robbins v. Chicago*, 4 Wall. (U. S.) 657, 18 L. ed. 427.
- (3) That a colt traveling alongside of its dam is not running at large, but is under control of its master. Authority: *Elliot v. Kitchens*, 111 Ala. 546, 20 So. 366, 33 L. R. A. 364; *Russell v. Cone*, 46 Vt. 600; *Barnes v. Chapin*, 4 Allen (Mass.), 444, 81 Am. Dec. 710.
- (4) That even if plaintiff were guilty of negligence, if the defendant with reasonable care could have prevented the accident, the defendant would be liable. Authority: 1 *Thompson on Negligence*, §§ 216-223, 231-9, 241-4, 267.

Outcome.

(a) Rulings of court.

- (1) Received.
- (2) Received.
- (3) Received.
- (4) Rejected.

(b) Exceptions taken to (4) by plaintiff.

XIII. General Objections:

- (1) In case of objections to statement of law by counsel to the jury: None.

XIV. Verdict: Favor of plaintiff for \$30 damages and costs.

XV. Motion for a New Trial: None.

ILLUSTRATION II.

TRIAL BRIEF—THE DEFENDANT.

IN MOOT COURT—COLLEGE OF LAW.
JOHN JONES V. CITY OF VERMILLION.

Before Issue Joined:

- I. Examination of Original Process:
 - (a) Defect of form content or service: None.
 - (b) State defect: None.
 - (c) State motion: None.
 - (d) Authority to sustain: —.

Outcome.

 - (e) Rulings of court: None.
 - (f) Exceptions taken: None.
- II. Examination of the Complaint:
 - (a) State defects.
 - (1) Complaint fails to aver negligence on the part of the defendant corporation.
 - (2) Failure to allege that plaintiff had presented a claim and demanded of the Board of Commissioners of said defendant corporation an adjustment of said claim for \$30.
 - (3) Failure to plead the statute imposing a duty upon said corporation to keep the streets in proper condition for travel.
 - (b) Met by motion demurrer or reply.
 - (1) Anticipated by plaintiff.
 - (2) Demurred on ground of no cause of action and no jurisdiction.
 - (3) Demurred on ground of no cause of action.
 - (c) Quote motion, demurrer, etc., if advisable.
 - (d) Authority cited:
 - (1) A complaint simply alleging "that by reason of the failure of said city to have a light at or near," etc., the place of accident does not sufficiently charge negligence on the part of the city. *O'Rourke v. Sioux Falls*, 4 S. Dak. 47, 54 N. W. 1044, 19 L. R. A. 789, 46 Am. St. 760.

- (2) Secs. 1 and 2, chap. 128, Laws of 1909, of South Dakota, require claims against a city to be reduced to writing and presented to and acted upon by the city council before suit shall be instituted, and then only when the council fails or neglects to act upon such claim.
- (3) In every case involving negligence there are necessarily three elements essential to its existence: (1) the existence of a duty on part of the defendant; (2) a failure of the defendant to perform such duty; and (3) injury to plaintiff from such failure of defendant. *Putney v. Keith*, 98 Ill. App. 285.
- (4) The absence of any of these three elements renders the complaint bad or evidence insufficient. *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261.
Code of Civil Proc., S. Dak., Sec. 140, p. 892.

Outcome.

- (e) Rulings of court.
 - (1) Granted right to amend.
 - (2) Sustained on (2).
- (f) Exceptions taken: None.
- (g) Amended complaint.

III. Theory of Prosecution as Disclosed in Complaint.

That defendant, the city of Vermillion, a municipal corporation is liable for the safe condition of its streets in damages resulting from an injury to plaintiff's property because of neglect of said corporation to guard sufficiently a sewer in process of construction by putting out signal lights after nightfall.

(a) Issues Involved in said Theory.

- (1) That the charter of the defendant corporation imposes a duty upon it to keep its streets in fit order safe for traveling.
- (2) That Main Street in the city of Vermillion is a common thoroughfare within the corporate limits of said city.

- (3) That defendant corporation suffered a ditch to remain open and unguarded on said Main Street during the night time.
- (4) That plaintiff's property, a colt, was injured thereby through no fault of the owner.

IV. Theory of Case as Expressed in the Answer.

That defendant corporation is not liable in damages for an injury resulting from the violation of a duty to the public when such duty is delegated to an independent contractor or where a compliance with a city ordinance on the part of the plaintiff would have prevented the injury.

(a) Issues to be Disproved.

- (1) That defendant was liable for the safeguarding of this particular construction work.
- (2) That it was necessary for the colt to be killed as a result of its injuries.

(b) Issues to be Proved by way of Counterclaim or Affirmative Defense:

- (1) That the duty of guarding the particular sewer rested upon the contractor.
- (2) That plaintiff violated a city ordinance by permitting and inducing a colt to run at large within the city limits.
- (3) That the plaintiff's loss was the direct result of his own unlawful acts.
- (4) That the plaintiff was negligent in the handling of his team and in allowing a colt to run loosened from its dam after nightfall.

(c) On Defendant's Motion: None.

(d) On Plaintiff's Motion or Demurrer: None.

Outcome.

(e) Rulings of court: None:

(f) Exceptions taken: None.

(g) Amended form: None.

V. Examination of Reply: None filed—Deemed denied.

(a) State defects: —.

(b) Motion, demurrer or replication: —.

(c) Authority cited: —.

Outcome.

(d) Ruling of court: None.

(e) Exceptions taken: None.

(f) Amended form: None.

After Issue Joined:

Negative Side of Defendant's Case.

I. Final Admitted Matter:

- (1) That a contractor was employed by the defendant to construct the said sewer.
- (2) That no barricades were put up immediately about the opening.
- (3) That the plaintiff was driving a team of horses and accompanied by a colt along said street after nightfall.
- (4) That the colt was running loose.
- (5) That there is a city ordinance against animals running at large in the streets.
- (6) That a statute exists making cities responsible for the safety of the main thoroughfares of the municipality.

II. Restatement of the Issues:

- (1) Was the city responsible for the putting up of lights at the time and place alleged in the complaint?
- (2) Was the injury of the colt due to the absence of such lights?
- (3) Does a broken leg necessarily require the destruction of a young colt?
- (4) Was said damage to the amount of thirty dollars?
- (5) Was the plaintiff negligent in driving his team? In caring for the colt properly?
- (6) Did the plaintiff violate an ordinance against animals running at large within the city limits?

III. Irrelevant Matter.

- (1) That the plans for the sewer were supplied by the city.
- (2) That the city of Hampton was held liable where it had employed the same contractor.
- (3) That the mayor had cautioned the contractor about leaving the trenches open.

- (4) That the employés were being paid out of the city treasury.

IV. Crucial Evidence to be Excluded.

- (1) That a broken leg renders a horse worthless.
- (2) That the colt was killed.
- (3) That the colt was or could have been by the side of the dam when it fell into the ditch.
- (4) Any agreement between the city and contractor relative to his responsibility.
- (5) The custom of the contractor in the past.
- (6) That plaintiff was unaware of any danger.
- (7) That plaintiff made a proper demand and was refused as required by statute.

V. Rebuttal Evidence.

- (1) That the work was not contracted for as by an independent contractor offset by evidence that the orders for workmen's wages were made by the contractor and checked against his account with the city.
- (2) That there were no lights put up offset by evidence that they were ordered so placed and that a barricade at the end of the street made them unnecessary.
- (3) That no veterinary was in town by evidence that he was within reaching distance by telephone.
- (4) That the colt was by the side of its dam by testimony that the dam was on the opposite side from that on which the accident was said to have occurred.

VI. Points to be Grilled on Cross-Examination:

- (1) That the plaintiff was not aware and could not see plainly an open ditch on said night.
- (2) That he was not in an intoxicated condition.
- (3) That he did not drive over barricades at the end of the street.
- (4) That he usually knew that the colt was by the side of the dam.
- (5) How the colt could be alongside of the dam when plaintiff was supposed to be driving along the middle of the street.

- (6) That a broken leg can not be healed by proper care.

VII. Objections to the Introduction of Evidence:

- (1) Objection to testimony on effect of the injury on ground of calling for expert knowledge and no proper foundation.
- (2) Objection to testimony on value of the colt on ground of calling for a conclusion of the witness and no proper foundation being laid.
- (3) Introduction of exhibit "A" objected to on ground that original is the best evidence.
- (a) Authority cited: None.

Outcome.

- (b) Rulings of court:

- (1) Sustained.
- (2) Overruled.
- (3) Overruled.

- (c) Exception taken to (2) and (3).

VIII. Motion to Direct a Verdict:

- (a) Summary of plaintiff's failure:

- (1) Has failed to show any liability for the particular injury resting upon the defendant.

Outcome.

- (b) Ruling of the court.

- (1) Motion overruled.

- (c) Exception taken: None.

Positive Side of Defendant's Case.

IX. Facts to be Established by Particular Witnesses:

Direct evidence.

- (a) Witness A—J. E. Weaton—Night Watchman:

- (1) That he saw the colt following a considerable distance behind.
- (2) That plaintiff had been drinking during the evening.
- (3) That plaintiff was driving recklessly.
- (4) That the night was not dark.
- (5) That the lights of a hotel near were burning.
- (6) That the open ditch could be seen at a considerable distance.
- (7) That plaintiff strove to control the colt but failed.

(b) Witness B—Sherman T. Wickre—Mayor and Horse Fancier:

- (1) That the contractor was competent.
- (2) That the city was not supervising the work.
- (3) That the contract marked exhibit "C" was the original contract.
- (4) That a broken leg in a growing colt does not necessarily resist healing.
- (5) That barricades were ordered put up at the end of the street.

X. Crucial Evidence to be Included:

(a) Nature of evidence.

- (1) That the contract called for an independent contractor.
- (2) That barricades were provided at the end of the street.
- (3) That the colt was an animal running at large.
- (4) That the plaintiff was not exercising ordinary care.
- (5) That the colt need not have been destroyed.

(b) Authority to sustain:

Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; Smith v. Kansas City, &c., R. Co., 58 Iowa 622, 12 N. W. 619; Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091.

XI. Objections to the Introduction of Evidence:

(a) Nature of objection:

- (1) That the distance of colt to team is irrelevant.
- (2) That the plaintiff had been drinking, irrelevant.
- (3) That the plaintiff was driving recklessly, irrelevant.
- (4) That the night was not dark, irrelevant.
- (5) That the hotel lights were burning, irrelevant.
- (6) That the ditch could be seen easily, immaterial.
- (7) That the plaintiff tried to control colt but failed, irrelevant.
- (8) That contractor was competent in calling for a conclusion of the witness and expert testimony with no proper foundation.

- (9) That the city was not supervising the work, irrelevant.
- (10) That a broken leg yields to treatment, not competent on foundation laid being expert testimony.
- (11) That barricades were ordered put up at the end of the street, irrelevant.

Outcome.

(b) Rulings of court:

- (1) Overruled.
- (2) Sustained.
- (3) Overruled.
- (4) Sustained.
- (5) Sustained.
- (6) Overruled.
- (7) Overruled.
- (8) Sustained.
- (9) Overruled.
- (10) Overruled.
- (11) Overruled.

(c) Exceptions taken to (4), (5), (6), (8), by defendant.

XII. Instructions to be Requested for the Jury:

- (a) That if the jury believe from the evidence that plaintiff was driving through the streets in a careless manner and that he was negligent in bringing his colt to town on the midnight of November 3, 1911, or if the evidence showed that plaintiff violated the city ordinance against animals running at large, or if the duty to keep the streets in good condition was not upon the city but upon the contractor, then to find for the defendant.

Outcome.

(b) Rulings of court: Rejected as a whole.

(c) Exceptions taken: Exceptions by plaintiff.

XIII. General Objections:

- (1) To allowing counsel to read cases to the jury: None.
- (2) Exception taken to that part of instructions to jury relating to defendant's negligence.

XIV. Verdict: Favor of Plaintiff, and \$30 Damages and Costs.

XV. Motion for a New Trial: None.

CHAPTER XX.

THE COURT ARGUMENT AND BRIEF.

Preliminary Considerations.

The court, jury and appeal briefs are alike in respect to the fact that each is made in anticipation of an oral argument. No brief, however skillfully drawn, can equal in effectiveness an equally skillfully made speech upon the same subject. Nothing surpasses argument, driven home by appropriate gesture, emphasis and the force of personality face to face with personality. But it must be excellently done. While the brief does not purport to set forth the furnishings of oratory, yet it must not become an obstacle in the way of effective speaking. In fact, it should strive to assist in at least two very important ways, namely, to secure clearness and to conserve brevity.

The Style.

The court brief may or may not be called for by the court. In either case it should be prepared for the double purpose of facilitating the oral argument and for the examination of the judge. Since it is made to assist a learned tribunal to arrive at a technical decision it should be scientific in construction and formal and didactic in style. More than this, it should provide for the same dignified and serious mode of delivery. As a rule, expository and argumentative discourse do not yield themselves readily to a conversational style of address. Certainly the opposite extreme of declamatory effort is not to be tolerated. A judge will be unimpressed by the one and disgusted with the other. The genuine de-

livery is one of earnest, forcible and, if possible, elegant expression, coupled with a dignified conservatism in manners and gesture, and always with the most courteous recognition of the court and profound respect for the traditions of the profession.

The effect must be one of life and vigor, but these must grow out of the subject-matter and not be sought for by spangles of rhetorical display tacked upon the outside. Thus figures of speech which aptly illustrate are valuable aids to perspicacity, while examples and allusions are often telling in their effects. The language may thus be made elegant, if not beautiful, without being in the least ornate or bombastic. It is always to be remembered that a concrete way of expressing an abstruse thought is not only the easiest to grasp and the pleasantest to the taste, but the most accurately recalled to the hearer's mind. Generally speaking, the lawyer should have mastered fully the terminology of the law, so that it may be said of him that when he talks to the court or the bench his style of language sounds like the law itself rather than an argument upon it. Whatever else be absent, one quality should never be lacking in a legal address, and that is the one of perfect lucidity. To acquire the latter demands a proper observance of several principles of subject-matter.

Presumed Conditions.

In the first place, the speaker and the brief maker should assume that the court is a body learned in the law and familiar with most of the general, elementary, well established and famous rules of the law. But at the same time he should know that a court is never adverse to having the memory refreshed by a brief review for this purpose. The court, on the other hand, has a right to assume that the advocate upon this particular question and at this particular time has made himself particularly conversant upon the theme

and capable of going into more detail than the court itself. Thus if both sides observe the logic and courtesies of the occasion the court will gladly listen and the advocate will be thoroughly prepared to present the case to the court as it should be done. And the first requisite to lucidity is brevity. But brevity, however, is wholly a relative matter depending upon the nature of the subject-matter. It is a method of treating matter rather than a mere aspect of shortened time. To be sure, brevity will always economize time, but mere shortness in time does not always secure brevity. Brevity comes from conciseness of thought and succinctness of statement.

The Method and Test of Good Argument.

Prolixity in legal argument should be avoided, for it reveals either want of study, lack of ability or both. And prolixity is often produced by a too large number of arguments merely assembled together. Argument should definitely begin somewhere and, moving with dispatch, end somewhere. Good argument is not a logical shower, but a consecutive line of inferences. Therefore the argument should start with a clearly defined and positive statement to be proved and the evidence in support be marshaled under the fewest number of obviously distinguishable heads, each being fully discussed before passing to the next and specifically anchored to the main proposition. Generally speaking, the proving of a proposition by bringing a particular case under a general rule where it is available is the most powerful form of reasoning. Induction, or rather what passes for induction, the drawing of an inference from an assemblage of facts each pointing toward the same conclusion is never free from a certain vagueness and lack of conclusiveness. One of the most common sources of obscurity is the confusion of more than one basis for the separation

into divisions. The divisions thus do not mutually exclude each other, but overlap in the most hopeless fashion. No hearer can extricate his bearings from such an entangling of cross-divisions. Usually the fewer the divisions, and the sharper in contrast, the more effective the argument. Now and then of course an extended and somewhat elaborate and complex discussion is necessary, but, whenever possible, unnecessary connecting links should be overleaped if the hearer's mind can be safely carried across. When, however, a minute and subtle distinction is crucial it must be at once magnified into a thing of proper proportions. All such methods must keep ever before themselves one test, the chain of thought must not break down and be severed by either the number or the length of its own links. The advocate must arrive through it all with his inferences, and the hearer to receive it at its true weight must have followed step by step without having for one moment lost the perspective of the whole route.

Unless all points bear directly upon the same point, the accumulative or agglutinative effect of evidence must not be allowed to dominate the consecutive line of inferences. The hearer must not be diverted to lateral objects until he loses awareness of the landmarks passed and the destination ahead. Deviation tends to become disconcertion, and hence should be scrupulously avoided. Thus the lawyer should have such a nose for the trail, to use a hunter's analogy, that the court can not resist following him to the inevitable conclusion. Nor should the movement of his thought be allowed to stagnate in pools of descriptive or expository detail, lest the hearer not only lose the momentum of the argument, but its resistless cutting edge and the forecast of its illumination ahead. The whole psychology of logical reasoning is to carry everything abreast with loss of nothing until all is delivered at last into the main proposition to be proved. It is the art of producing unity in multiplicity.

Adaptation to Questions of Law.

PROPER REFERENCE.

Furthermore, the court brief adapts itself to the argument upon questions of law rather than of fact. It should consequently aim to make any other recourse to documents, memoranda or the reading of reports during the argument unnecessary. An awkward interruption of the line of thought to search for an authority among a pile of books, or the clumsy leafing of a report to locate a case or passage is an unpardonable offense against the time of the court and a psychological blunder that always metes out its own punishment. The brief should have everything needful fully abstracted and, when important, quoted so that the address may present a smoothly running and uninterrupted discourse. Moreover the argument should not be case-burnt.

USE OF CASES.

A proposition should be based explicitly upon principles of law and justice, even when ably supported by cases. The reasons should loom greater than the cases, and hence the habit of deluging the court with cases is not to be commended. A few cases are better than many, for they stand out distinctly and maintain individuality, but if multiplied lose power. One case, well selected and to the exact point, is worth more than a round dozen of pretty close cases. So, too, much depends upon the advocate's ability to make the case talk, for many lawyers do not argue a case but merely cite it, a difference far reaching in its effect.¹

A case must not only be a fit, but more important still, it must be shown why and in what respects it is a fit. To do this demands a complete mastery of the case from every

¹ Elliott's App. Proc., § 447.

point of view, as pointed out under the estimation of decisions in another part of this work. The brief should never contain the reference "to see such and such a page", but should epitomize just what such a search would find. The brief is not a table of references, but a table of goods found and ready for immediate delivery. And what is said in this respect of the brief may be applied with even more force to the oral address.

APPLICATION OF GENERAL RULES OF LAW.

Moreover, questions of law naturally involve rules of action, whether they be found expressed in statutes or precedents, hence the various incidents relative to the nature and application of legal rules are pertinent to the brief maker and disputant. And first of all the advocate should not fall into the temptation of taking long shots in the application of general rules of law. The maxims of law should not be made a blanket argument to cover any set of facts which pass out some color of the precious metal. It may, after all, turn out to be fool's gold or not in paying quantities. Maxims because they are maxims are not thereby universalized. In fact there are but few general rules that have no exceptions. One of the common errors of practitioners is not merely to overlook exceptions to general rules, but to extend general principles into universal rules. Thus the general rule is that one crime may not be established by evidence of another. But one who should invariably apply this general rule to resembling cases would go astray, for there are many cases having many elements in common to which the general rule does not apply; as, for instance, "where the offense is continuous or where one crime is connected with another or where knowledge and interest form essential ingredients of the controversy." So also says Mr. Townshend, in *Ram on*

Legal Judgments,² "We believe that not a single law maxim can be pointed out which is not obnoxious to objection". Maxims must yield to justice, for the primary value of a maxim is after all a means of acquiring and retaining legal knowledge. The error is not in the use, but in the abuse of the principle.

But the strength of a general rule and its applicability can not be destroyed on the ground of hardship in particular cases, for isolated cases of hardship are much less deplorable than a general evil. Laws must necessarily act with uniformity without fear or favor, and unless excepted either expressly or by implication, special instances will fall within the rule. It is sounder reasoning to attack the weakness of the general rule than to argue its harshness in a particular case. A doubtful case can more often be argued from under a rule by a multiplication of exceptions than it can be brought within the rule. And particularly courts are slow to extend the applicability of bad laws to new cases, or old laws to new cases which entail hardship. And, furthermore, a strong defense against a general rule is developed in showing a cessation of the reasons for which the law was created. Nevertheless a favorable contention for the further extension of a law may sometimes be made by showing that no better rule has been devised, and to insist that it is more dangerous to the cause of justice to make further exceptions than to enforce the rule, that it is better to keep to the known than to risk the untried. And it must not be forgotten that it is within the prerogative of the court to take into account the consequences entailed in new applications of the law, although they well understand that "accidental evils will sometimes result from the soundest rules of law when applied to the facts of particular cases".

More often the argument falls short because the advocate relies too strongly upon merely finding and citing the general

² Page 45.

principle. The application to the particular case in hand must not be left to the court. It is this logical connection between rule and particular case which demands the most skillful and conspicuous exposition. Many errors may be found in the reports which prove that lawyers often start from a correct premise only to arrive at a wrong conclusion because they fail to accurately distinguish and note the difference between the case in hand and those very similar cases which are governed by the general rule. They know the rule and its requisites well, but they have never mastered either the exceptions or the differentiating element which removes them from under the rule.

DIVERSE THEORIES OF ADJUDICATION.

Just as all issues of law arise in the interrelation of general rules to facts, so every application of an old principle to new facts may involve either of two diverse theories of adjudication, the one based upon the practice of "like reason" the domination of precedent and the authority of "stare decisis", and the other the broad outlines of natural justice. The former constitutes a formidable defense against change, and the argument of certainty, stability and uniformity is difficult to overcome, yet there is trenchant force in the answer that conformity with usage is never a justification of fixity, and that too much adherence to the past may result in keeping us in the past and be a positive obstacle in the way of progress. And the trend of more recent judicial decisions appears to favor the latter point of view. After all it is well said that "precedents are only the images of principles", and principles themselves, in the course of time, need reinterpretation to accord with the demands of actual life.

Divisions of the Brief.

PRELIMINARY STATEMENT.

Since this brief takes into account the relation of the advocate to the court, its first office is to prepare the argument for a favorable hearing. Some explanations in the way of personal or professional adjustments relating to court etiquette, or the ethics of the profession, may be serviceable to render the occasion free from misinterpretation or embarrassment. Thus Webster in the case of *Gibbons v. Ogden*³ prefaces with an explanation why a further discussion should not be construed as a reflection upon the work of the highest tribunal of the state of New York.

These grow out of many circumstances, but are not to be inserted unless they perform a genuine service. They are often very graceful and complimentary.

STATEMENT OF FACT.

In the next place there should follow a compactly, and yet adequately worded, statement of the facts of the case. This may frequently consist of a "present status" of the facts, and a preliminary history of the facts leading up to the present situation, and without which the latter can not be thoroughly understood and appreciated. The first part of this statement will sometimes subdivide into the facts constituting the origin of the case, and the facts which furnish the occasion for precipitating the litigation. Both should be set out briefly but sufficiently to make the "present data" fully significant. A good statement of the facts furnishes the very foundation of the argument, and hence the advocate should write this out with the most exacting precision and diction so as to throw the cardinal issues into a conspicuous high light.

³ 9 Wheat. (U. S.) 1, 6 L. ed. 23.

The importance of clearly analyzing the origin and the occasion becomes apparent when we discover that often the peculiar nature and merits of the issue or issues will be traceable to one or the other of these sources. The occasion, as succeeding the origin, represents the form under which the issue emerges from the background of past conditions. Thus sometimes the nature of the almost remote past as in the Dartmouth College case⁴ will have a determining effect, and sometimes the mode of the emergence or occasion as in the Dred Scott decision⁵ will supply the dominating factor, or again, neither will be determinative, but both highly illuminative as in the case of *Gibbons v. Ogden*.⁶ Smaller cases although on a much more diminutive scale reveal the same possibilities. Of course in many instances no definite distinction between origin and occasion exist.

EXPLANATIONS AND DERIVATION OF THE ISSUES.

Next in order, as a result of these conditions, the general nature of the issue or issues should be explained. Sometimes it is the question of the interpretation of a statute, a provision of the constitution, or a rule of the common law, or it may turn upon the applicability of a statute, or it may be a violation of the law of procedure, or finally it may be the insufficiency of the facts which take the case from under the general rule. Whatever it may be should be plainly set before the court.

STATEMENT OF THE ISSUES.

Following the classification of the field of contention should come a positive declaratory statement in direct form of the

⁴ *Dartmouth College v. Woodard*, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

⁵ *Dred Scott v. Sandford*, 19 How. (U. S.) 393, 15 L. ed. 691.

⁶ 9 Wheat. (U. S.) 1, 6 L. ed. 23.

issue or issues in support or antagonism of which the argument is to be made. These should be clearly separated and numbered so that they may be argued separately and in order. And finally, should the issue turn in any way upon a definition or explanation such preliminary discussion should be made so that it may neither obscure nor impede nor interrupt the main argument which should immediately follow.

ARGUMENT.

Each issue in turn must be supported by the best evidence obtainable by exhaustive research and it is well to assume in advance that no memory, however well trained, can retain the law in vivid form, if indeed it has ever been in possession of a measurable portion of it. Careful investigation will almost without exception repay in thoroughness in treatment and confidence in the outcome. The order of presenting the materials of argument usually follows that of the priority of authority, namely, constitutions, statutes, cases, encyclopedias, treatises, judicial comment and the "rule of reason". As elsewhere more fully stated the argument should be pointed up by brevity of statement, proper connectives and a system of indentions which enable the eye at a glance to place the particular material in its proper logical relations in the discussion. So also there should be adequate quotations where this is economical of time and impressive in effect, but the danger of excessive verbiage is always to be zealously guarded against.

CONCLUSIONS.

The conclusion in this form of brief need be little more than a summary of the main steps in the argument, together, in some very extended discussions, with a review of the main points supporting them. The conclusion should never

introduce any material which would have the slightest tendency to raise a new question or issue. Its function is to concentrate the mind in a final effort to the conclusiveness of the preceding argument.

OUTLINE OF THE COURT BRIEF.

I. INTRODUCTION.

A. Preliminary statement.

B. Statement of facts.

(1) Origin of the case.

(2) Occasion—Manner of emergence.

{ History

{ Litigation

{ Pleadings,
Etc.

C. Definitions and Explanations.

D. Derivation of the issues.

(1) Whether an interpretation of statute.

(2) Whether an interpretation of common law.

(3) Whether a violation of procedure.

(4) Whether an insufficiency of facts alleged.

(5) Whether additional facts remove from under the rule.

(a) Through an exception.

(b) Through supplementary law.

(6) Whether the rule is inapplicable.

E. Statement of the issue or issues.

(1) Exact point where controversy begins.

(2) What is admitted.

(3) What is irrelevant.

II. THE ARGUMENT.

A. First Issue.

(1) Statement of the exact proposition.

(a) Citation of statute.

(b) Citation of cases.

(c) Citation of rule of reason.

(d) Citation of encyclopedia.

(e) Citation of treatises, judges, etc.

(2) Summary of the evidence.

B. Second Issue (same as above).

III. CONCLUSION.

(1) Summary of the argument.

THE COURT BRIEF.

ILLUSTRATION I.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR
LANE COUNTY.

LEO BURG.....	PLAINTIFF	} DEFENDANTS' COURT BRIEF.
v.		
E. MOUSTGAARD AND	} DEFENDANTS	
J. W. ZIMMERMANN		

INTRODUCTION.

I. PRELIMINARY STATEMENT:

The defendants in this case appear not for the purpose of offering resistance to a just claim nor to argue technicalities, but because the facts in this case reveal a scheme on the part of the plaintiff and his counsel to profit at the expense of innocent parties. What are these facts?

II. STATEMENT OF FACTS:

The petition and complaint of the plaintiff is on file and in the possession of the court and discloses the fact that under the guise of seeking to have a mortgage satisfaction canceled and to protect the interests of an ignorant client, counsel is really attempting to foreclose a defunct mortgage and collect a substantial attorney's fee.

The case arose as follows: The plaintiff, on the 16th day of January, 1912, sold to one Flora Hayes a piece of real estate, taking a note mortgage back on the purchase price. Said property passed through two or three hands and finally came into the ownership of Roland M. Lightle, still subject to said mortgage. While in Lightle's possession, defendant, Moustgaard, obtained a judgment against Lightle, docketed on the 15th day of January, 1914, for the sum of \$886.79 and costs \$10.80. Of this sum, \$638 was satisfied upon execution, leaving \$259.59, with interest at 6% from January 8, 1914, which became at once a lien upon the above property.

As defendants believe, in order to escape this lien

Roland M. Lightle conveyed by a quitclaim deed on June 11, 1914, his title to said land back to Leo Burg, the original owner and mortgagee, and present plaintiff in this case. Immediately thereafter on June 15, 1914, the plaintiff, himself, satisfied the said mortgage on the record (Vol. 31, p. 625, of the mortgage records of Lane County).

Said plaintiff, in foreclosure proceedings upon said satisfied and defunct mortgage, now asks that the satisfaction be canceled, the occasion for which action being prompted by the necessity of having the mortgage revived so that it may become subject to foreclosure and attorneys' fees.

III. DERIVATION OF THE ISSUES:

To this complaint and petition we demur on the ground that it does not meet the requirements of the law in its allegations and on the contrary admits such facts as now make an action for the restoration of the mortgage illegal and impossible, because,

Issue I. The petition must make a positive allegation of a lack of knowledge of any lien.

Issue II. The petition does allege the existence of constructive notice of such a lien.

Issue III. The petition alleges facts in contravention of any intent to keep the mortgage alive.

ARGUMENT.

ISSUE I.

In order to obtain such relief as asked for in this petition in a court of equity it is necessary that there be a positive and direct allegation of no knowledge of any lien when the instrument was satisfied, for,

Point. 1.

If such knowledge existed, either actual or constructive, no relief will be granted.

In *Talbott v. Garretson*, 31 Ore. 256, 49 Pac. 978 (1897), Bean, J., said: "It is unquestioned that a court of equity will, in a proper case, restore the lien of a mortgage canceled by mistake; but before it will do so it must be made to appear that at the time of the cancelation or release the

mortgagee did not know of the intervening lien. This is so elementary that a mere statement is sufficient. Manifestly, a mortgagee who, with complete knowledge of the existence of another lien on the mortgaged premises, deliberately cancels and releases his security, can not subsequently ask a court of equity to restore to him his original priority."

The court here states that the rule is so elementary as to need but a mere statement and the only questions now remaining to defeat this action is whether the petition made such an allegation, and secondly, whether it did not state facts which admitted to be true by such allegation renders any amendment to the pleading futile.

Point 2.

The petition does not make any positive and direct allegation of a lack of knowledge. It merely alleges as follows:

"That the first that the plaintiff knew of the said judgment was about January 1, 1915."

See lines 29, 30 of petition.

See case, *supra*, 31 Ore. 256, 49 Pac. 980. "But nevertheless the statement of the new matter in the amended complaint as filed is clearly insufficient as a basis for the relief sought, because it is not alleged that the cancelation of the mortgages was made in ignorance of the defendants' judgment."

While from this allegation an inference might be made of such lack of knowledge, yet such a conclusion would constitute an argumentative inference since the complaint does not directly connect the cancelation of the mortgage and the fact of ignorance of the judgment as coexisting. Such pleading is therefore insufficient in substance and form.

ISSUE II.

The petition does affirmatively allege facts which constitute constructive notice of a lien, for

Point. 1.

The complaint alleges that the plaintiff received the land back under the form of a quitclaim deed and

such a deed constitutes constructive notice to a man of ordinary intelligence to the effect that some obstacle stands in the way of a warranty of clear title. See lines of complaint, 23, 24, 25.

It is universally known that a quitclaim deed does not warrant title and is used only in cases where an owner for reasons does not care to undertake the risk of a warranty deed. This is at once constructive notice to a purchaser for the effect of a quitclaim deed is a legal effect and should at once put the vendee in a position of obligation to investigate the reason for such a mode of transfer. If he takes it he does so with all the attendant risks and he can not thereafter plead ignorance, for it is not a question of a mistake of fact, but of law. In consequence of this the plaintiff can not allege that he was ignorant of a fact and in the same complaint admit and allege the presence of another fact which in itself imputes constructive notice of the said fact.

Point 2.

Again the complaint alleges and admits the existence of a judgment lien at the time the cancelation took place, but once more a judgment lien is also constructive notice when upon the records and hence no ignorance of such fact is possible to the plaintiff.

See 23 Cyc. 856, 3:

"The record of a judgment is notice of what it contains or recites as against parties properly before the court and those whose situation requires them to inform themselves of the judgment, provided the judgment is properly entered and clearly recites or describes the fact in question, or shows enough to induce a cautious man to make an investigation."

In the case of *Muller v. Flavin*, 13 S. Dak. 595, 83 N. W. 687, the court makes the above observation, and again:

"At the same time a subsequent purchaser is affected with such notice as the index entries afford, and if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril." *Metz v. State Bank*, 7 Nebr. 165.

Thus the plaintiff has not only failed to allege facts sufficient to bring his claim under the jurisdiction of a court of equity, but in such attempt has admitted facts which negative any possibility to remedy the deficiency. In short, he has legally admitted his case to lie without the reach of an equitable remedy.

ISSUE III.

Finally the petition should allege an intent on the part of the plaintiff to keep the mortgage alive, but while such an intent is stated in general terms, yet the effect and truth of such statement is negated, for

Point 1.

The complaint also alleges that the mortgage was canceled without any consideration whatever, but if there was no consideration as a motive then the intent must have been to destroy the mortgage or his act would have been an absolutely purposeless idiotic performance.

Point 2.

And again the complaint alleges still other facts in contradiction of such an intent and clearly indicating a different purpose, for it is alleged that the lien amounts to \$259.59, which it was his intent to avoid, but also alleges reasonable attorneys' fees for the service of foreclosure proceedings to the sum of \$200, which, together with the costs and trouble, will amount to as much or more than the lien itself. If the mortgage is sought to be revived on the theory that the owner never consented to let it expire, in fact, why does he now ask that it be revived for the very purpose of destroying it as a future protection through foreclosure? With one hand he asks for a restoration and at the same time with the other he asks for a decent burial. We submit that the whole procedure is a scheme between Roland M. Lightle and Leo Burg to defeat the defendant in collecting his just debts.

CONCLUSION.

Since, therefore, the complaint on its face makes no positive allegation of ignorance of any lien at the time of cancelation as is required by law, and

Since the complaint on its face admits constructive notice by alleging a transfer to the plaintiff by a quitclaim deed, and

Since the complaint on its face again admits constructive notice of said lien by an allegation of the docketing of said lien before the act of satisfaction, and

Since the complaint on its face denies any intent on the part of plaintiff to keep alive said mortgage by negating any other motive than that of destroying the same and by the contradictory petition to foreclose and nullify its existence, therefore we submit to the honorable court that not sufficient facts have been alleged to constitute a cause of action and that sufficient facts have been admitted in said petition to warrant the court in sustaining the demurrer and in refusing any request to amend the pleadings.

ILLUSTRATION II.

IN THE COUNTY COURT OF THE STATE OF OREGON FOR
LANE COUNTY.

IN THE MATTER OF THE GUARDIANSHIP OF BESSIE MCKINNISTER, SOMETIMES CALLED BESSIE VON CARNOP, A MINOR.	}	RESPONDENT'S COURT BRIEF.
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INTRODUCTION.

I. PRELIMINARY STATEMENT:

The respondents in this action feel that it can be no reflection upon the ability of the county court in raising a question of priority of jurisdiction. The parent having begun an action in one county and the child being a resident of another county necessarily raises the question of the legality of the proceedings.

II. STATEMENT OF FACTS:

This action, having been heard by the above entitled court it is unnecessary to repeat the facts of this case for the benefit of the court the same being still clear in the court's memory. However, the very unusual claim of the mother in this case for a just opportunity to repossess her lost child entitles the respondents to a most careful consideration of their claims.

III. DERIVATION OF THE ISSUES:

The fact that a brother of the child's mother has already been appointed by the original court having jurisdiction over the divorce and the subsequent care of the child, as guardian of the same, raises the issue of whether the present court under the circumstances has any jurisdiction over the disposition of the child, and the further fact that the mother is opposed to the religious training now being given to her child raises a further issue as to whether a parent or third parties has a preferential right to determine such a question. The issues thus become:

Issue 1. Does the county court have jurisdiction?

Issue II. Is it within the proper discretion of the court to award the custody of the child to third parties when one parent is without notice and the other objects to the religious training?

ARGUMENT.

ISSUE I.

Our contention in this action is that this court is without jurisdiction, because,

Point 1.

The original court having jurisdiction over the divorce of Emma Lillian Baldwin from her first husband has a continuing jurisdiction over the child, Bessie McKinnister, until the age of legal maturity, for

The Supreme Court of Oregon has interpreted the statutes of the State of Oregon as giving such continuing jurisdiction. (See case of *Henderson v. Henderson*, 37 Ore. 141, 60 Pac. 598-99.) The court says:

"The statute authorizes the court, upon motion, to set aside, alter, or modify as much of a decree of divorce as relates to the maintenance of either party to the suit." Upon this language, Mr. Justice Moore comments: "The modification contemplated comprises the subject-matter of these several subdivisions respecting which the court is

empowered to enter its decree in the first instance and may be tersely enumerated."

1. As it respects the appointment of trustees for the care and custody of minor children.
2. As it respects the nurture and education thereof.
3. As it pertains to the maintenance of either party to the suit.

Point 2.

That any action tending toward a modification of any preceding decree of the original court must be brought by a proceeding in the same court as that which made the original order and by a motion within such original jurisdiction and not by filing a petition for guardianship, for

(See Standard Encyclopedia Procedure, Vol. 7, page 858.)

"The jurisdiction of the court being continuous in such cases, the removal of the parents or children from the jurisdiction does not divest the jurisdiction of the court to make such modification. The proper method of procuring modification is by proceeding in the same court as that which made the original order, by motion in the original action, not by filing a petition for guardianship, nor by habeas corpus proceedings, unless a change becomes imperative."

(See *McNees v. McNees*, 97 Ky. 152, 30 S. W. 207.)

"It seems to us the Kenton Chancery Court was the court to apply to for relief if appellant was entitled to any further judgment or order in regard to the maintenance of the child.

"Many good reasons might be assigned in support of the wisdom and propriety of the law vesting the control of such matters in the court rendering the judgment of divorce, but it is not necessary to do so now. It follows from the foregoing that the demurrer to the jurisdiction of the Harrison Circuit Court should have been sustained and the petition ought to have been dismissed. The judgment is therefore affirmed."

(See *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 404.)

"The decree in divorce awarding the mother custody of the child of the parties only till further order of the court, and subject to the restriction that the child be not removed from the court's jurisdiction, retains to the court jurisdiction and control of the divorce proceeding, so far as it relates to care and custody of the child, and such court having afterward entertained petition of the father for custody of the child, and the mother having appeared by attorney, *the court had complete power and authority to make such order as it considered best for the best interests of the child with reference to its subsequent custody and control; which jurisdiction could not be defeated by the child being secretly removed by the mother to another county and the jurisdiction of the court thereof being invoked in proceedings for adoption of the child.*"

(See 11 Cyclopaedia of Law and Procedure, 985, under caption "Scope and Effect of Proceedings in Another Court.—a. Priority and Retention of Jurisdiction") :

"Where two actions between the same parties, on the same subject and to test the same rights, are brought in different courts having concurrent jurisdiction, the court *which first acquires jurisdiction*, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy. This rule has been applied to proceedings in different probate courts of concurrent jurisdiction, and likewise to proceedings in a probate court, and a court of equity."

Our contention is that the Columbia court having first acquired jurisdiction over the subject-matter of this action, to wit, the custody of the minor child, and having exercised the same by appointing the grandmother custodian and having the right to make any further provision whenever circumstances warrant a further order and such representation having been duly made between the only parties directly concerned and the said court having appointed a regular guardian for the said Bessie McKinnister, that this court, namely, the Probate Court of Lane County, Oregon, is without jurisdiction, since the power of said

Columbia Court is adequate to the administration of complete justice, retains its jurisdiction and may dispose as it deems fit.

Point 3.

That in cases of concurrent jurisdiction between a chancery court with full equitable power and a county court the former has priority of jurisdiction.

(See *King v. Berry*, 3 N. J. Eq. 44):

And where the jurisdiction of the orphan's court and the chancery court are concurrent it has been held that where the relief sought by a party requires the exercise of equitable powers the jurisdiction of the latter court is paramount.

We maintain that since the court which took original jurisdiction of the divorce proceedings and thus acquired jurisdiction over the custody of the said Bessie McKinnister was a court clothed with full equitable powers and that the present court is a court of merely semi-equitable powers, in short, a so-called orphan's court or having jurisdiction over questions involving abandoned or delinquent children that the former court according to the above ruling is paramount on this ground as well as the other grounds already specified.

Many other cases are cited in support of the above quotations in *Cyclopedia of Law and Procedure*.

ISSUE II.

We further hold that the discretion of the court is abused if the custody of children is awarded to a third and disinterested party where one of the parents is without notice and the other parent is opposed, because

(See *Ex parte Clarke*, 82 Nebr. 625, 118 N. W. 472):

"The appointment of a guardian by a county court is not conclusive as against a parent's right to the custody of his children, unless it appears that he had notice of the proceeding, and that the question of his competency and suitability was adjudicated." "We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole

reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed by revolution, if necessary."

(See *In re Knowack*, 158 N. Y. 482, 53 N. E. 676) :

"And in a proceeding by parents to obtain possession of children from the Children's Aid Society it was held that where the parents had reformed and were leading proper lives the children should be restored to the parents notwithstanding they had been committed to the society by police justice of Rochester." See also *Curtis v. Curtis*, 46 Wash. 664, 91 Pac. 188; *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 Pac. 660.

(In *Davis v. Davis*, 10 Wkly. Rep. 245) :

In a contest between a mother and testamentary guardian of a boy to have him made a ward of the court and to make him a Catholic according to the will of his father who had died, it was held that the father's desires must prevail.

Again (*Reg. v. Barnardo*, 58 L. J. Q. B. 522) :

"The mother of an illegitimate child under twelve years of age contracted that the child should be given for twelve years to the custody of defendant who had charge of the Protestant institution. She then brought an action to regain his custody in order to have him trained as a Catholic. It was held that she was entitled to the writ."

Again (*Reg. v. Clark*, 7 El. & Bl. 186) :

"A widow brought habeas corpus for the custody of her children where they were in an orphan Protestant school. The mother was Roman Catholic and her children were being brought up in

the Protestant religion. It was held that the children should be returned to the mother."

Again (Reg. v. Williams, 58 L. J. (N. S.) Q. B. 176):

"A widowed mother whose son had been baptized a Roman Catholic placed him in a Protestant charitable school and subsequently brought an action to remove him so that he could have Catholic training. It was held that the authorities had no right to interfere and the custody of the child was awarded to the mother."

In all of the cases above mentioned the important fact is noted that irrespective of what the nature of the religion was that the parents' wishes were held paramount to that of third parties and institutions. Those above have referred to the mother and to the Catholic religion while the following refer to the father and to the Protestant religion:

(See *McGlennan v. Margowski*, 90 Ind. 150):

In this case where the mother of the child had died and the control of the child was claimed by relatives of the wife on the ground that it should be raised in the Roman Catholic religion it was held on a writ of habeas corpus that the father was entitled to the custody of the child.

Again (In re Meades, I. R., 5 Eq. 98):

"The father, a Protestant, had promised on the marriage that the children should be brought up in the Catholic Church, subsequently on the wife's death the children had a Protestant governess and attended the Protestant Church. After a delay of nine months an aunt brought a suit to have the children made wards of the court to enjoin the father from interfering with the religion of the minors. It was held that the petition should be dismissed."

CONCLUSION.

Finally, as a summary, in consideration of the fact that the Supreme Court of Oregon has interpreted the statute of Oregon relative to this action as clothing the original court granting a divorce with full power over the custody of the children and jurisdiction to change or modify such decree whenever the circum-

stances warrant, and since the authorities uniformly hold that the original court obtaining jurisdiction has a continuing jurisdiction and since the authorities uniformly hold that the court first taking jurisdiction over the subject-matter of an action has the paramount jurisdiction where two courts having concurrent jurisdiction are invoked, and further, when a court having full equity powers is invoked as against a court, exercising only semi-equitable powers, the former court has the paramount jurisdiction, and since the authorities show also that where no notice is given to a parent that adjudication upon the custody of the child is irregular, unlawful and not a proper adjudication, and since also the authorities show that the rights of the parents are paramount over those of third parties, and since, further, the law requires that an action for the custody of the child be brought by a motion in the original court and not in the form of a petition, now, therefore, in further consideration of the fact that the Circuit Court of Columbia County first obtained jurisdiction over the subject-matter of this action, to wit, the custody of Bessie McKinnister, and has, upon the method prescribed by law and upon a full hearing of all the parties legally interested in the child, made a decree appointing, with the consent and desire of both parents, one John W. Von Carnop, an uncle of the child, to be its lawful guardian, and since the said court is a court having full equitable powers, whereas the County Court of Lane County, Oregon, is a court exercising but semi-equitable powers, and since the application for a guardianship should according to law have been brought by Mary K. Birchmanns in the original court and upon a motion and not by petition, and since, further, this petition of Mary K. Birchmanns was given a hearing without notice to the father of the child and hence illegally brought. Therefore we respectfully submit to your Honorable Court that the said action upon petition of the said Mary K. Birchmanns be denied, the action dismissed and the cause be referred to the Circuit Court of Columbia County, Oregon.

Court overrules.

ILLUSTRATION III.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE
COUNTY OF JACKSON.

STATE OF OREGON.....	PLAINTIFF	} STATE'S COURT BRIEF.
V.		
HARVEY BAXTER.....	DEFENDANT	

INTRODUCTION.

I. PRELIMINARY STATEMENT:

It may be contended in a case like this that the ethics of the profession should deter one attorney from bringing a criminal action against a fellow practitioner, but when such an attorney directly interferes with another attorney from performing his sworn duty to the state and for the state, then such an ethical consideration vanishes at once, if indeed such an obligation had ever existed.

II. STATEMENT OF FACTS:

The defendant, Harvey Baxter, an attorney at law, was employed as counsel to defend a man, Hiram Streeter, charged with rape upon one of his daughters. Upon preliminary examination the most damaging evidence was given by the mother, two other daughters and the prosecutrix herself. He was, therefore, bound over, under very low bonds, to await the action of the grand jury. The jury had been called and the family of four subpoenaed to appear before it, when this attorney, in connivance with the felon, prevailed upon the family to leave, and alone by night and took them to the railroad, bought them tickets and removed them by stealth to Sacramento, California. This attorney accompanied them, registered them under a false name, rented a house for them, put the oldest girl into a commercial school, supplied them with money to buy provisions and returned. However, the district attorney discovered the move, put officers on their trail and a few days later captured the entire family and brought them back before the law could be invoked to prevent it.

III. DERIVATION OF THE ISSUES:

The question for determination in the facts in this case is as to whether assistance to a person charged with a felony in the form of removing the prosecutrix and all of the state's witnesses while under subpoena to appear before the grand jury, out of the state, makes such person in the eyes of the law an accessory after the fact. Such question will depend upon what the concept of law, accessory after the fact, has been construed to mean, or by reasonable interpretation should mean. This will demand an investigation of the common law to ascertain the true intent and spirit of the crime, and a further investigation of the application of the said concept made in American jurisdictions. The issues then will be:

Issue I. Are the marks of a sexual crime left upon the living body of the prosecutrix such circumstantial evidence which, if removed, would assist the felon to escape, as interpreted by both common and statutory law?

Issue II. Is the removal of all the witnesses from the state while under subpoena such an assistance of the felon to escape trial and punishment as would come within the spirit of the law?

ARGUMENT.

A Question of Interpretation: What is the meaning of the crime—Accessory After the Fact?

A. THE COMMON-LAW VIEW:

(a) *Form of Indictment Usually Employed:*

"Did feloniously receive, harbor and maintain."

Upon the interpretation of this language, Lord Al-
verson, C. J., said in *Reg. v. Butterfield*, 1 Cox Cr.
C. 39 and quoted in *Rex v. Levy*, 28 Times L. Rep.
93; said:

"It can not be denied that it has been the practice
for many years to use that form of words when
indicting a person for being an accessory after the
fact."

The question of scope was raised.

Objected that evidence did not show that appellant

had received, harbored or maintained. Answered: "But the word receive has a technical meaning and includes—It seems agreed that generally any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose." In 4 Stephens Com., ch. 3, it is stated that "generally any assistance whatever given to a felon to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory."

Near the beginning of an exhaustive note upon the subject, American Annotated Cases 1912 B, 503n, it is said: "The authorities seem to support the general rule that the destruction or suppression of evidence of a crime, or the manufacture of evidence tending to prove a felon's innocence may constitute such assistance or maintenance given the felon as to render one an accessory after the fact."

The above note exhaustively reviews the English cases and then refers to the three leading American cases where the subject has been discussed, namely, New York, Kansas, Texas.

(b) *The Spirit and Intent:*

The spirit and intent of the common law naturally sheds much light upon the proper intent of the statute, the latter, of course, being based upon the former and it is a general rule of interpretation that a statute should always be interpreted in connection and in the light of the common law.

The common law and American cases seem to agree upon two basic elements of the crime, to wit:

1. There must have been positive, overt, assistance, physical in nature and not merely influence, persuasion or silence.
2. The assistance must have been personal to the offender, that is, in connivance with his will and primarily to assist him.

In *Wren v. Commonwealth*, 26 Grat. (Va.) 952, the court said: "The true test for determining (says 1 Bishop Cr. Law (5th ed.) sec. 695) whether one is an accessory after the fact is, to consider whether what he did was done by way of *personal help* to his

principal, with the view of enabling his principal to elude punishment—the kind of help rendered appearing to be unimportant.”

But upon the question of what kinds of assistance may exist the courts have not generally defined and the particular cases having in issue one or more of several different conditions of fact coloring the particular case have not been complete nor entirely uniform in their discussions—in short, more or less obiter dicta has been indulged in.

However, it is possible to observe where the weight of authority trends and this seems to follow the scope intent and spirit of the common law upon the subject.

Now it is plain that the common law purposed to include any assistance of whatever kind so that it be personal and active, which would defeat any element essential to arrest, trial, conviction or punishment. The last words, “arrest, trial, conviction or punishment” are statutory, but it is clear that they are but a restatement or modified form of the common law, “did feloniously receive, harbor and maintain,” which, as we have shown above, was interpreted to cover, “any assistance whatever given to one known to be a felon in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose.” For example:

Removal of Defendant Himself: The personal presence of the felon was essential to arrest, trial, conviction or punishment and therefore the common law includes any kind of assistance which would tend to remove his body.

Reg. v. Smith, 38 U. C. Q. B. 218, Wilson, J., said: “Did she do any act to assist the felon personally? She said, ‘the prisoner told me to keep quiet and to give him time to get into bed. I closed the door.’ This giving time to the prisoner to get into bed, etc., are facts, which in my opinion, constitute the offense of receiving, relieving and comforting or assisting him as if she had changed his clothes or washed out marks of blood upon them, etc.”

Wharton’s Criminal Law, 354-5: “When we examine the cases given, however, we find that the

assistance to a felon which constitutes this form of accessoryship, is such assistance as to some extent shelters the principal from prosecution, as, for instance, where the alleged accessory concealed the principal in his house (Dalton's County Justice, 530-531), or shut the door upon his pursuers until he should have an opportunity of escaping (1 Hale, P. C. 619), or took money from him to allow him to escape, or supplied him with money, a horse, or other necessities in order to enable him to escape, or where the principal was in prison, and the accessory, before conviction, bribed the jailer to let him escape, or supplied him with materials for the same purpose, or in any way aided in compassing his escape."

Removal of Circumstantial Evidence: The common law went further, since evidence was essential to conviction, if not trial itself, the removal or prevention of evidence was made sufficient to constitute the offense. Emphatically so with reference to circumstantial evidence as shown by the following cases:

Convicted of removing from a workshop fragments of molds and other things such as would be used in making counterfeit money. *Rex v. Levy*, 28 Times L. Rep. 93.

One who assisted a robber in disposal of his loot. *Reg. v. Butterfield*, 1 Cox Cr. C. 39.

One who assisted a murderer to dispose of the body of his victim. *Rex v. Greenacre*, 8 Car. & P. 35, 34 F. C. L. 280.

That the common law makes a clean sweep, including both the acts of removing or concealing the person of the offender and also the acts tending to the removal of circumstantial evidence, is conclusive from the summary above given. When we come to the question of testimonial evidence the law is not so direct, but must be carefully scrutinized. On this subject the common law makes little specific comment.

The Removal of Witnesses: However, the disposition of these cases involving the removal of testimonial evidence is, it is to be observed, conditioned generally upon the clearness with which the cir-

cumstances indicate an intent to assist the felon or otherwise.

Thus the uncertainty of intent in the following cases seems to have removed them from the actionable class rather than the mode of assistance.

(c) *Examples of Intent Governing:*

1. Supplying a felon with victuals in prison. No criminal intent certain. (Rex v. Chapple, 9 Car. & P. 355.)
2. Sustaining a prisoner out on bail. No criminal intent certain. (1 Hale P. C. 620.)
3. Professional attendance on sick or wounded felon. No criminal intent certain. (1 Hale P. C. 332.)
4. To speak or write to obtain pardon or deliverance. No criminal intent certain. (Infra.)
5. To agree not to give evidence against a felon. Not certain as to motive. (Wren v. Commonwealth, 26 Grat. (Va.) 952.)
6. To advise friends to write to witnesses not to appear at the trial. Not clear as to whom the intent is to shield. (3 Co. Inst. 139, 1 Hale P. C. 621.)

We note also that the common law has excused only those forms of assistance which were negative and passive, or assistance so remote or indirect as not to be personal to the felon, or cases of assistance which were incidentally so to the offender and really intended to shield and protect others.

B. THE AMERICAN LAW VIEW:

It is undisputed that the statutory definition of crimes either is intended to set aside the common law, to restate it in other terms, or to enlarge or diminish its application.

Let us now review the American status of the question which is epitomized by most of the authorities by reference to the decisions of three courts in the order of time, New York, Kansas and Texas. There are, of course, numerous other cases upon the general question of accessory after the fact, but these three courts have dealt ex-

pressly with the question as raised in this indictment, to wit:

"Does assistance to the defendant in removing from the state the person of the prosecuting witness and other witnesses after the arrest of the defendant and when under the subpoenas of a grand jury constitute one an accessory after the fact?"

(a) *New York Authority:*

New York presents two cases apparently sustaining the negative of the above question, for example, In *People v. Dunn*, 53 Hun 381, 6 N. Y. S. 805, 7 N. Y. Cr. 173, 25 N. Y. St. 460, it was said:

"That to assist a felon to elude punishment would not necessarily render one an accessory after the fact to the felony and therefore to prevent the attendance of witnesses, though it might have the same result, would not render one an accessory after the fact."

From this it might be inferred that any form of removing witnesses would be held nonactionable, but it does not say so, but emphasizes the possibility of such a thing merely—a conclusion which admits of an exception. It says to assist a felon to elude punishment would not necessarily be actionable as an accessory after the fact, hence, although removing witnesses might have the same effect, therefore it would not necessarily have an actionable result. This is logical and true when the intent was not to assist the criminal, but to shield someone else. The intent in all cases must be to criminally assist the felon. The above statement is therefore no authority that removal of witnesses under all circumstances would not be actionable.

Again (*People v. Dom Pedro*, 19 Misc. 300, 43 N. Y. S. 44, 12 N. Y. Cr. 399): In this case occurs probably the strongest statement on record in the negative of this question. But its force as a precedent disappears upon an analysis of the circumstances under which rendered. Gaynor, J., says:

"Of this part of the charge it is also to be noted that the words 'to shield a person who had committed a crime against the laws and to aid him to

escape from justice,' is not a correct definition of the crime charged. It conveys to the jury the idea that if the defendant had used any means to shield Fino, and enable him to escape justice, he was guilty of being an accessory. But this is far from being the law."

To the above criticism of the instructions of the court there can be no objection simply because it does not distinguish between passive means or means with an intent not criminal or means which are not personal.

The court then continues to emphasize the proper conception by pointing out the need of these elements. He says:

"One can not be found guilty as an accessory to a felony except upon proof that he gave *personal assistance to the felon* (note the kind) with intent to enable him to physically get away (note the intent and active overt kind of help) such as to conceal him, to rescue him, to furnish him with a horse, and the like. That he fail to identify, or to forget, or not to prosecute, suborned witnesses, or the like, does not make out the crime." (Note the absence of these elements in these illustrations.)

Manifestly when the idea which the court is trying to emphasize here is followed, the language nowhere says nor gives room to infer that with a criminal intent to assist the felon, the overt personal assistance to the felon of removing the prosecuting witness, body and all, would not be actionable. Yet to get any authority in support of the defendant such far fetched inference would have to be made.

Moreover the case amounts to but little when we discover in addition that the felon had escaped without trial and been gone for a year and the only question was in connection with a corroborating witness.

(b) *Kansas Authority:*

The state of Kansas also raised the question in two cases, neither of which, however, turned upon the issue in this case.

(State v. Doty, 57 Kans. 835, 48 Pac. 145):

This case held that where a mother asked her daughter to conceal the paternity of a child and tell an untruth did not constitute her an accessory after the fact because her intent was not criminal—not to shield the felon, but shield the victim.

(State v. Jett, 69 Kans. 788, 77 Pac. 546):

This case held that where a person, to protect a girl from shame, induced her to leave the state and not appear as a witness was held not an accessory after the fact because the motive was not to assist the culprit, but to aid the victim.

In both of the above cases it is obvious that the issue in a case where there existed criminal intent was not raised and any discussion on such issue would have no authority or force—be obiter dicta.

(c) *Texas Authority Conclusive:*

Finally the state of Texas stands conspicuous as the greatest authority upon the precise issue presented by this case at bar. Following a long line of decisions, all in harmony, the precise question at issue before us was raised for a special hearing before the Supreme Court of that state upon a motion for a rehearing in the case of Harrison v. State, 69 Tex. Cr. 291, 153 S. W. 139, where the court gave a thorough discussion and review of the whole question from every point of view, citing the authority usually advanced, pointing out their faults and unanimously sustaining the doctrine as the most modern view of the subject. The case of Harrison v. State is almost an exact counterpart in essential details with the case at bar.

STATEMENT OF FACTS.

The prosecutrix had been seduced and was before the grand jury in Comanche county, Texas. The father and brother had also been subpoenaed to appear. The following day they were trading at a small town near and were approached by Harrison, who proposed that the family leave the state and friends would secure funds. He was joined by another friend and consent was gained. That night Harrison and friend conveyed the family

and baggage to a distant station where they gave them funds and they left the country. Harrison pretended to the father that he was doing it for the sake of the girl, but he was conniving with the felon, Waribury, in so doing, and the court held him to be an accessory after the fact.

COURT'S OPINION.

The court said, after an exhaustive study of the entire subject from the standpoint of both the common law and American decisions, as follows: "If this court were bound by some of the general statements in some or all of these opinions (referring to citations by appellant of former Texas decisions, some New York and Georgia cases, *Am. & Eng. Encyc. L.*, notes 2 and 3, page 267, and *Cyc.* 12, 192, sec. 3) of the character that it takes to constitute one an accessory after the fact, they would be in point and strongly support appellant's contention. But when each case is carefully considered, it will be noticed that the general statements and quotations of the common-law text books of what it takes to constitute an accessory were uncalled for, and in most, if not all instances, obiter dictum, it then illustrates at length."

"We have discussed this branch of the case thus lengthily because of the fact that our statute as to accessories has never been before directly construed."

"Now in the light of our statute quoted above and of the first decision of this court construing it on this point, let us see what character of aid appellant rendered to his principal, Waribury, in this case."

"Waldrip, the father, and his son Tom, were to go to where the girl, Mattie Waldrip, and her sister were, some several miles from Gustine, take them in the dead hours of the night from where they were then living, some ten or twelve miles to his camp, and then, in the dead hours of the night, he, the father and the girls were to be taken away by appellant from Comanche county and secreted where they could not be found, or run out of the state, to thereby directly aid said

Waribury in preventing his indictment and trial and arrest. Waribury furnished one of the teams, if he did not also furnish one of the vehicles in which the appellant and other parties interested with him were to take these witnesses away from Comanche County Court. Waribury went with these part of the way that night, driving one of the teams, when they were going after these witnesses. Waribury was a party to the whole thing and did actually participate therein and had appellant and the other party with him to take these witnesses away. *Thereby the appellant* rendered him the aid contemplated by our statute. No greater or more direct personal aid could have been rendered to Waribury by which he was to evade a trial and an arrest under an indictment charging him with the seduction of the girl. Spirit-ing the necessary and important witnesses out of the jurisdiction of the court and out of the state, as the indications were that these witnesses were to leave the state, is uncomparably greater and rendered directly and personally to the appellant than that of merely furnishing him with a horse or vehicle, or money to himself get away." "Even if he could have or should have gotten out of the state, if no indictment had been found against him, he could have been arrested anywhere in the United States and perhaps other nations, extradited and brought back to Comanche county for trial; but if appellant had spirited the witnesses out of the state there is no way known under the law whereby such witnesses could legally have been returned to the jurisdiction of the court in Comanche county or their evidence had."

C. EQUIVALENCE OF THE TEXAS AND OREGON STATUTES:

(a) *The Texas Statute:*

"An accessory is one who knowing that an offense has been committed conceals the offender or gives him any other aid in order that he may evade an arrest, or trial, or the execution of his sentence."

(b) *The Oregon Statute:*

"All persons who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction or punishment are accessories."

It is obvious and indisputable that the Oregon and Texas statutes are almost identical and the only difference is one merely of the arrangement of clauses. If the Supreme Court of Texas finds after a special hearing upon the exact question at issue in this case that the defendant, Harrison, was guilty as an accessory after the fact, then the defendant, Baxter, is also guilty according to this most recent (1913) and excellent decision and authority. "This statute has never been construed in this state upon this issue and hence the parallel statute and parallel case afforded by the Texas jurisdiction should weigh accordingly in determining this issue.

CONCLUSION.

A. OUR THEORY OF THE CASE:

- (a) We maintain that the defendant connived with the person of Mr. Streeter to assist Mr. Streeter to avoid conviction by consulting with him, planning with him and aiding him overtly to remove the person and baggage of the Streeter witnesses from their home to the distant state of California and city of Sacramento.
- (b) That the assistance was given in order that Mr. Streeter might not be confronted with evidence to convict and might thus escape trial, conviction and punishment.
- (c) That the defendant assisted Mr. Streeter in removing and spiriting away physical evidence of the crime upon the body of Laura Streeter and also all of the principal testimonial evidence for the state beyond the reach and power of the state to examine upon the witness stand while such witnesses were under subpoena by the state.
- (d) That the defendant, being the attorney for Mr. Streeter, was in a position to know, and did know,

as required by law, that he, Streeter, had committed a felony and was seeking to avoid the legal consequences of his crime.

We submit that if the removal of counterfeiting stamps is actionable and the removal of the dead body of a victim as removing circumstantial evidence is actionable, why is not the removal of the living body which bears circumstantial evidence of crime just as actionable? The marks upon the sexual organs of the prosecutrix while still alive are just as much evidence as they would be if the body be dead. There is no difference—the conclusion is inevitable. And if the spirit and intent of the criminal statute is to prevent the complete obstruction of justice, then what would more completely accomplish this end and paralyze the arm of justice and the state than to remove all of the witnesses already under the purvey and order of the court to a distant state where no process of law could compel them to return? The conclusion here also is inevitable. The defendant has rendered himself subject to the penalty of the statute.

CHAPTER XXI.

THE JURY BRIEF.

Nature and Purpose.

The aim of the jury brief, like that of the trial brief, is to render assistance to the maker himself, and like that of the court brief constitutes a preliminary preparation for an oral address. It therefore becomes subordinate to the purpose of such address which has always the one end—to get a verdict. And yet this statement should be strongly conditioned upon two things, namely: that such verdict be fairly won, and that it be tempered to the justice of the cause. Naturally such an aim introduces into the problem the nature of the jury as the source of that verdict. The jury, as a minimum requisite of success, must be moved to decide the case in a particular way. It is thus a will moving process. Such is also true in the case of the court brief, but in that instance the court may be formed of one mind only, while that of the jury is a composite decision rendered by several minds. Here then is a contrast worthy of careful consideration, and marking out a wide difference in the spirit and latitude of the two briefs and corresponding addresses.

The first tribunal is constituted of a judge who is trained in the principles of the law, in legal terminology, in analysis of facts and in subordinating emotional elements strictly to intellectual considerations. A brief, fitting an argument into the form of an oral address directed to the understanding of such an arbiter, must needs be a much more conservative and didactic performance than one directed to the unconventional human nature embodied in the personnel of the ordinary jury. Nevertheless it must not be inferred from this that

the latter need to be less scientific in treatment, for, on the contrary, the skill requisite to control the minds and feelings and wills of a number of interacting, untrained but practical men, is even more exacting than in the former case. The court meets the argument half way with a splendid equipment of legal experience and knows how to accurately organize and sift the evidence produced, but the jury is invited to step into a field of experience, unfamiliar if not new to them, and to face the solution of problems fraught with human weal or woe if not calamity, without any preparation or safeguard against the sophistries of unscrupulous advocates. Yet this fact furnishes the first principle toward a successful appeal. The address must be based upon the jury's own experience, that is, constructed as much as possible out of the materials of their own ideas and experiences in life. The argument must not be delivered to the jury, but their minds must be worked into and conducted through the argument in language, imagery, objects, values and experiences which they are fully able to understand and appreciate. In short, the nature of the jury must be consulted at every turn and point. Thus the speaker and hence the brief maker should carefully take into account: (1) The jury's impression of himself; (2) the jury's estimation of his cause; (3) the jury's perception of his attitude; (4) the jury's grasp of the subject-matter; (5) the jury's assimilation of details; and (6) the jury's danger of misconception.

The Jury's Estimation of Counsel.

The first step toward influencing an audience favorably is to secure a favorable reception, and the jury is no exception to the rule. But a favorable reception is merely a normal reaction to a favorable impression which the speaker is bound to make or not to make. And the attorney has been gradually, during the trial, either creating a beneficial or detri-

mental judgment of himself in the minds of the jury. They have been silently but attentively taking an inventory of his human attributes. For this reason the lawyer should appreciate that the beginning of the end of the trial is at the very beginning of the trial. First impressions are sometimes very unfairly tenacious. Generally if first and second impressions are well taken care of, the last impression will take care of itself. A jury dislikes to agree with and advance the cause of a man whom they dislike. This is not logical, but it is natural and instinctive.

Now to begin well, the speaker should at least give the impression of consistency. There may be an occasion when it is necessary to justify the advocate's right to be heard in the case. Webster made an explanation of his personal participation in the case of *Gibbons v. Ogden*.¹⁹ Usually the jury will take the right for granted unless the question is raised by a designing opponent. In the next place the speaker should be deeply in earnest, and it should be the kind that glows in the face, looks out of the eyes and trembles upon the tongue. The cause should take possession of him, but it should not blindly and fanatically obsess his judgment and self-control. There must be no acting of a part, or championing of a cause—no flippancy. The seriousness and dignity of the issue must be incarnate in him. Its value and worth will speak through him in proportion as it becomes one with him. Such earnestness by no means excludes pleasantness and even laughter upon occasion for these are full of content, and not necessarily the empty vials of cant and hypocrisy.

Another quality, second only to earnestness, is that of power. It is inherent in men to respect and admire power. Power is not identified with loudness of speech and seldom employs it, nor is it force of expression only, but it is this

¹⁹ Wheat. (U. S.) 1, 6 L. ed. 23. See also The White Murder Trial; Prentiss' address in the Wilkinson case.

and much more—it is an impression of great capacity to do, and reveals itself in vigor, promptness, movement and decisiveness of thought coupled with an ease and variety of expression. It does not quibble, protest, hesitate, vacillate or brag, make unsupported assertions, nor overattack; it makes concessions when fair and carries its positions with overwhelming completeness. This impression is much enhanced by a decisive victory at the very outset.

A third quality in the speaker which imparts a singular effectiveness to what he says is the element of vividness. This is the faculty of thinking in the concrete rather than in the abstract, or clothing ideas in sensuous imagery taken from the familiar walks of life and full of the warmth of association. Such a style of expression is aglow with many lights, is sparkling with suggestion and charged heavily with emotional electricity. It is agreeably stimulating without being sensational. It is a rare quality of mind and smacks of the soil of original energy. Supplementary to the qualities already given it is accountable for the irresistible fascination of some speakers.

A fourth requisite to impressiveness is candor of habit, homely honesty and fairness, which men are accustomed to describe as "being on the square." Many men display but a neutral tint of this fundamental confidence giving attribute. Sometimes, however, the very expression of the countenance and physical movements, as well as the tones of the voice, disclose a positive lack of genuine straightforwardness, or, on the other hand, a character "four square to all the winds that blow". Such a characteristic is of inestimable worth in the art of moving men. But it is a reflection from the grain of the wood and not a veneer which can be spread on for the special occasion.

In addition to the foregoing qualities the advocate should preserve a high order of dignity. The jury expect and are influenced by the speaker's appreciation of the proprieties

of his duty and the gravity of the occasion. The sense of the "eternal fitness of things" will reveal itself in a lofty deference to the court, courtesy toward his fellow counsel, nobility of posture and chastity of language. Refinement should mark every feature of the address. Coarseness and vulgarity of expression should never be indulged in even for a moment. A worthy theme is worthy of a corresponding presentation, and a successful advocate never appears less masterful than his theme. Such attributes combined in the speaker himself at once arouse in the jury a favorable response to the merits of his cause and make it easy for the hearer to believe that here indeed repose the claims of justice.

The Jury's Estimate of the Speaker's Cause.

It is highly important that the jury at the outset be given a proper conception of the speaker's cause. There is no spontaneous sympathy for an object which gives the impress of injustice. Men prefer to think that they are espousing the cause of justice. Therefore the counsel should make it appear that his ground is the equitable one. Equity is the quality of fairness between man and man, irrespective of legal rules. It is rightness founded upon moral considerations which constitute the foundation of all law. If the lawyer can impress the jury that his client's cause is not only legal, but equitable as well, he has laid a sound basis for a successful appeal.

In the next place, to reinforce the justice of the cause with an additional observation that the client is ethically deserving of the verdict is effective for it sometimes occurs that a man may be so generally reprehensible in character and conduct that he really does not merit justice. He has been himself so unjust that the harsh rule of "an eye for an eye and a tooth for a tooth" seems more appropriate to

his case. When on the contrary the opposite condition can be shown to exist, the jury is fortified in going as far as possible to satisfy the ethical claims of such a situation. To be equitable, and at the same time ethical, is a double reassurance against technical doubts.

Third, the jury should be made to feel that the advocate is presenting the case as it actually is. There is a sense of intimacy with a true situation which impresses confidence to act, hence the jury should be brought into such an impression of contact with the circumstances that they may feel that they are dealing first hand with them. Since no person in a position of responsibility likes to act too indirectly, the speaker should therefore introduce his hearers immediately to the case itself and efface all appearances of agency on his own part. Thus the jury in an atmosphere of mutual confidence should be enlisted to co-operate with the speaker in an impartial consideration of the case. For assuredly there is a vast difference between an impression of the case as it is, and an impression of hearing the case presented by a partizan, and hence there should never be given occasion for a legal tribunal to make allowance for an apparent concealment or exaggeration of facts at the hands of a distrusted manipulator.

Furthermore, whenever possible, the jury should be made to feel that the speaker's cause is supported by the weight of presumption. That the opinion of society crystallized without bias and through the severe tests of actual life is in accord with the position taken by the speaker is a powerful ally in restraining a counterdecision. Men prefer to appear before the community as reasonable, and instinctively hesitate in opposing established views. For this reason they hold themselves amply justified in following the consensus of public opinion, when no extraordinary reasons appear for doing otherwise.

And in connection with the fact that organized society has

put itself upon record in relation to the merits of the case, it is often of the greatest effect to fully set out the consequences of the action, not only as bearing upon the parties involved alone, but upon society in general. The force of example and the need to be extremely cautious in establishing the proper kind of a precedent is a controlling motive in the minds of many law-abiding citizens. So, too, a jury when brought face to face with critical if not calamitous effects to follow from their decision, are put under the stress of a feeling of personal responsibility for the same. And such an impression, once made, is very difficult of removal. The adequate reply that a jury is but an agency of the state and should act strictly for its principal, although sound in principle and theory, will seldom remove the covert fear of individual culpability. However, a complete understanding of results is a powerful stimulus to the most conscientious performance of their duty.

And, finally, the jury should be inducted into the theory of the case, so that it is made to appear in the form and experiences of life with which they are familiar; that their own simple ways of estimating right and wrong and of reaching justice may be applied to the weighing of the evidence with perfect safety in the case, and that the law does not require of them to be lawyers nor to be trained in court usages in order to reach a fair and impartial verdict. Such an understanding of the work which they are expected to perform will greatly enhance their respect for the speaker who leads them to such a point of view. They are led to believe that such a lawyer is a practical man and one worthy of being followed.

The Jury's Estimate of Counsel's Attitude.

The personal element constitutes such a powerful element and influence in moving men, even when the fact is not

consciously present, that the advocate should study carefully how his own will-power is likely to impress the jury. We have already noted the personal element as disclosed in the character of the speaker, and its impress upon the hearer, but we now turn to the advocate as he reveals himself in action before the jury. Men approve and disapprove certain attitudes which the lawyer exhibits in their presence. And it follows that it is hard to receive a good impression of a cause through the medium of an irritating representative. Man and ideas presented seem to go together. Bad men are usually associated with bad causes and vice versa. And what the jury interpret to be a conscientious attitude of the advocate toward themselves, other persons, institutions and the subject-matter, is very apt either to please or offend their standard of professional manhood, and the same quality is logically or illogically identified with the cause itself. It is an unfortunate spectacle to hear a lawyer who distrusts his own impression endeavoring to evade the effect by pleading with the jury to eliminate himself in passing upon the merits of the question. To raise such an issue between a speaker and his treatment of a theme renders such a logical separation practically impossible psychologically. It is much more likely to augment the fusion of the two. The lawyer should always remember that his adjustment to the court is primarily a logical one, but to the jury a psychological problem.

In compliance with such considerations the advocate should avoid the separation of himself, in the minds of the jury, either from the cause or from themselves. Such a breach arouses a critical frame of attention which not only diverts from the inherent force of the argument itself, but prevents his own influence from taking effect. Thus, figuratively speaking, the advocate should not get himself into the conspicuous attitude of being an advocate, of being outside of and over against the jury in a professional act of performing upon them, if indeed not the disagreeable experience of

pounding something into them. He is likely to feel the resistance resulting from such a situation as quickly as they are to resent the process. They do not enjoy the idea of being clay in the hands of the potter to be shaped at the turning of a lathe. He should combine sagacity to determine what to do, and tact to do it adroitly, to prevent such an impression. Usually he produces such a result from his own false idea of the process. He permits his own mind to dwell too consciously upon his method, and thus strives to manipulate his hearers, rather than to so fully lose himself in the theme that it induces the desired result. A lack of the most thorough preparation and mastery of the subject-matter and its material order of presentation is bound to prevent, not only a unity of subject and speaker, but also of speaker and jury. He is on the outside of the subject because he has never worked himself into it, and although he may beat the waters into foam during the address he is bound to be ever arising to view like a cork upon the surface. Coupled with an insufficient mastery of the subject is the stupid recourse of endeavoring to capitalize on the emotions. Thus he endeavors to play upon the emotion without connecting them with a reserve fund of thought. Feelings stimulated through the inherent values and associations of genuine subject-matter are always legitimate means toward volition, and do not demoralize the one who experiences them, but when an attempt is made to arouse them for their own seductive influence, then the hearer is made to feel that the speaker seeks to take advantage of human nature if not human weakness. The inference is that the jury is constituted of such raw material that they can not distinguish between thought and sentiment, a conclusion which carries with it a suggestion of imposition and an insult to intelligence.

On the other hand, the professional capacity in which he operates should be effaced as much as possible, and he most successfully accomplishes this by actually adopting the atti-

tude of a co-worker with the jury and court in adjusting the case on its actual merits. He should first be persuaded in his own mind that the end which he seeks is the proper one. No man can put heart and self-effacement in a cause which he believes at the time to be unworthy. Hence the advocate should genuinely solicit the aid of the jury in reviewing with him the various problems presented by the evidence. Such an attitude will stimulate his hearers to plunge themselves into the solution of the problem. When this is accomplished the harmonious interaction between speaker and hearer is perfect. Thus a co-operative spirit and a complete absence of self-consciousness is the open sesame to this result.

Then too the attitude of the speaker toward other persons engaged in the controversy is bound to fall under the observation of the jury. And this relation has gradually been assuming distinctness throughout the trial so that it is a matter which demands constant watchfulness. For example, outside of the requisites of gentlemanly respect and courtesy, the attorney should never put a witness in a false light or needlessly embarrass or injure the feelings, nor should the advocate ever indulge in personal abuse under the garb of professional privilege, for such a practice belongs to the underhanded coward and will arouse a slow-burning indignation in the minds of the jury for which no amount of excellent logic can quite atone. The use of but fair words in praise, and plain to condemn, commends itself as a general thing, while contradictions are often best treated as innocent mistakes rather than evidences of fraud. Not infrequently even a well-timed admission of some phase of the opponent's case manifests a splendid spirit of generosity, although it should be made so explicit that no malicious misrepresentation may thereafter be made of it. A reasoner loses nothing and many times inspires confidence by recognizing obvious points against himself, and in exceptional cases an advocate may disconcert his opponent by stating his adversary's ground

better than its supporter has presented it, but this is a hazardous undertaking unless the refutation in support of the explanation is conclusive. However, from the obnoxious extreme of endeavoring to overpersuade the jury the speaker should not veer to the opposite equally obnoxious extreme of fawning servility. In his desire to win the approbation of his judges he may dissemble with the most crass and fulsome flattery. Such a proceeding is execrable. It is a sound policy never to praise with one hand and hold out a platter with the other. Counsel should always be considerate of the comfort, feelings and beliefs of the jury, but give "not a cent for tribute". The proper attitude is that often recommended as the "golden mean", the finding of which is not unlike in difficulty that of finding the "Holy Grail".

The Jury's General View of the Case.

Whatever conception the jury may have of the case it is highly probable that prior to the arguments of counsel their view lacks organization and unity. It has entered into their consciousness in the form of many evidentiary fragments and resembles more a chaotic mass than a systematic whole. The test of strength is now on, as to which of the opposing counsel shall shape and construct a unified whole which will so appeal to the minds of the jury as to furnish it with a working basis. For it must inevitably occur that when both sides have theories dedicated to the end of proving opposite results the two are more or less contradictory and are rivals for adoption by the jury. And although the jury do not purposely intend to adopt at the beginning either one or the other, yet as a matter of fact the one or the other, by its commanding aspects, will naturally serve the jurymen as a working basis from which to inspect the details as they pass in review. Thus unawares the one plan is securing a permanent foothold and establishing a permanent position. The

result is that the advocate who is able to sketch his own background and have it adopted by the jury as its point of view has a most decided advantage over his adversary. The winning of the background or general outline of the case is therefore a capture of the first commanding strategic position.

The jury must be given a perspective of the case. There must be a background, not only of what occurred, but also of the method of systematizing it around certain issues to be proved. In short, there must be a framework into which to assemble and dovetail the details. Such details will constitute a foreground of immediate inspection and interest, and when once the background is well established the jury will participate keenly in the sometimes thrilling process of fitting the facts into their places.

As to just how the background and general plan shall be mapped out and charted has been to some extent determined by the theory of the case which has been followed out during the trial, and to a considerable degree by the evidentiary material and the character of the witnesses. But a definite plan for the argument is indispensable. A simple principle never to be violated in this connection is never to arbitrarily impose a plan upon subject-matter, but to seek for a division of the subject which appears to naturally and artlessly spring out of the subject itself. Such a scheme of division will be in accord with the individual features of the situation and harmonize more fully with the experiences of the jury. Moreover, artificiality suggests a fatal variation between expression and fact. Truth has a way of evolving with a noiseless and elementary simplicity that casts a suspicion over a too elaborate mechanism. The conclusion is manifest—the plan should be both natural and simple, reduced to the fewest possible general attention centers.

Besides a general conception of the field to be covered by detail, an appropriate style of language should be adopted to give such plan its proper coloring. There must be an ade-

quate moving matrix of expression which shall bind details to the general outlines of the discussion, like the waters of a stream flowing through and around the numerous craft and islands and rock reducing all into one harmonious picture. Every device of rhetoric should be at the command of the speaker; there should be variety of expression and diction suited to every moving phase of the action. Wit, humor, pathos, laughter, solemnity, majesty and a hundred other sentiments and feelings are wonderful agencies in their proper places, while illustration, suggestion, anecdote, story, quotation, reference, allusion, figures of speech, bits of description and dramatic narrative as well as keen analysis and resourceful exposition are the very paraphernalia and accoutrements of action. Reinforce with these the forms of logical inference, and the address will take on sumptuousness and moving power. A dull, monotonous and broken order of discussion will leave a limping line of logic and prevent the solidity of impression which forecasts a favorable verdict. To be sure the melting, smelting and amalgamating process here emphasized calls for an intellectual animation and fluency of expression which only comes as the reward of exhaustive preparation and much practice in public speaking. But these are the things which a successful advocate cultivates most assiduously in the profession.

Again, the argument as a whole is usually much determined by the side of the case from which it arises. In most instances it is both constructive and destructive, aiming to build up its own theory and to break down that of the opponent. When the advocate is for the plaintiff his argument is for the major part positive and constructive, since he ordinarily sustains the burden of proof, but if he be for defendant and have not the burden of proof his major discussion will be negative and directed to the destruction of the plaintiff's case. As a rule the plaintiff's position should be made relatively stable before refutation should be entered upon, while

the reverse holds true of the defendant's method. Thus general refutation in the former should come toward the last, and in the latter at the beginning of the argument, and be presented in a solid body, while, on the other hand, refutation which springs out of isolated details is often most effectively made at the time and in the light of the circumstances under which it arises. Whenever possible the two diverse theories should be distinctly contrasted, the one going up while the other is going down.

The Jury's Appropriation of Details.

Just as it is fundamental that the jury acquire a properly laid out background, so it is equally important that the details be correctly grasped and assimilated at their true worth. It is true that the jury have listened to the evidence in the course of its production and have estimated it in a crude fashion according to their several experiences and understanding, but unless the case is somewhat simple and the evidence overwhelmingly on the one side it is probable that they have arrived at different conclusions and for diverse reasons. Even courts comprised of trained members now and then disagree in the conclusion reached, and in some instances an agreement in result has been based upon very different reasons. Much more so might we expect such a result from a jury. However where a unanimous decision must be reached it is obvious that the more certain the preliminary plan, the more effective will it be in bringing about a unity in the evidentiary basis for such a decision. It therefore becomes necessary for the advocate to review the evidence for the benefit of the jury, that they may have the benefit of his more thorough comprehension of the relations and values contained therein. He must exhibit and compare and weigh and deduce logical inferences from the mass of data. Thus this material must be estimated, sifted and organized into a

consistent foreground. In order to accomplish this necessary work some advantageous principles should be observed as well as certain defects avoided.

First of all, details which are crucial to the case should be made to stand out with unusual conspicuousness and should be permanently fixed in the hearer's mind and memory by an undetected repetition of the point through a restatement in various forms, and from different points of view. The ability to practice this logical art is dependent upon fertility of imagination, a clean-cut appreciation of the idea, a readiness of expression and vocabulary and a quick perception of the point from all sides.

One of the best devices for producing a sharp and definite impression is that of comparison. The process contains a mild element of surprise and stimulates the hearer to anticipate the points of likeness and difference. It thus arouses an active interest in the outcome while the interplay between the two objects serves to prevent the attention from relaxing through fatigue. The method is therefore one of the most successful to sustain interest until the images are cut and trimmed into definite proportions.

An application of the above principle is sometimes more effective than a direct argument. For instance, the opponent's theory can often be most easily destroyed by setting up a counter theory and comparing by contrast the two in relation to their reasonableness and consistency. The double advantage is that the destruction of the one does not merely leave a resulting blank in the mind, but furnishes as a substitute a positive object of thought upon which the mind can repose. In such a case there is little danger of the mind reverting to the former position.

Details will appear to the jury in two different aspects, the one pertaining to their meaning or significance, and the other relating to their values. Hence the advocate must see to it that both of these phases are correctly interpreted. In

the matter of their meaning it may be said that facts although appearing in evidence often as detached fragments, nevertheless draw their content of inferential value from the environmental setting from which taken. The speaker therefore should not fail to put them back into their proper setting for the contemplation of the jury. A fact isolated is a false dummy, but in its natural limitations often speaks louder than words.

A close inspection of evidence in its original circle of relations will also reveal its probability and enable the improbable material to be cast aside, but it will do more than this, for it will show it to be material or immaterial to the issues. Such evidence as is favorable should be organized if possible into a distinctive support, for all weak arguments of a detached character are worse than useless. So also an unstable argument of the opposition should be analyzed and its defects clearly and distinctly exploited. However, it is very unwise to abruptly attack an argument which has made a good impression upon the jury. Under these conditions the reply should be prefaced with the conciliatory remark, that although it would be natural at first thought to hold such a view yet not infrequently a more careful consideration reveals conditions at first overlooked. The jury having thus been innocently exonerated from weakness are then quite willing to hear another version of the matter.

Closely related and indeed supplementary to clear analysis of facts is the need of explanation. Facts which are important should not be left to explain themselves. Mere citation is not explanation. To propose a comparison between two objects is not to make a comparison. The process, however, of explanation varies from meager definition to exhaustive exposition. Usually popular rather than technical phrasing should be used. Unnatural things should be made to appear natural, and abstruse conceptions should be translated into analogous everyday relationships. Moreover, explana-

tion should explain and not confound by the employment of terms which need interpretation worse than the original. This is a common fault. And so, too, an explanation should never be so elaborate as to emasculate the strength of the idea. Many words in which to express few ideas is a linguistic disease, and should be rigorously repressed. Nevertheless the misleading danger of partial explanation is obvious. Posing as a process to clear up the truth about a situation it may omit the very element which determines the whole. The truth thus becomes concealed in the very act which advertises a complete exposure. For this reason an explanation merits especial scrutiny.

A favorite substitute for an explanation is a challenge in the form of a question. While it amounts to no more than a bare assertion, it sounds much more impressive. But it is a shrewd trap for the unwary. To suddenly demand an answer seems often exceedingly convincing, and with not a shadow of substance may produce astonishing results. Being catchy, emphatic and often highly dramatic, it is a splendid example of where form is the robber of substance. Such interrogatories are natural and forceful adjuncts to good reasoning, but the caution is, not to allow them to pass for more than they contain. They are simply a vigorous method of introduction or enforcement.

When we pass from the interpretation of meaning to that of the value of details, it should not be overlooked that truthfulness is a condition of all value. Hence the reality of the facts introduced into evidence must be first made certain. But the best test of actuality is consistency. Incongruity and contradiction among the evidentiary facts are synonymous with error. Nature, as a whole, is wonderfully complex, but just as wonderfully harmonious and consistent. That facts exist is conclusive proof that they fit together and therefore that facts should fit together is strong evidence of their truthfulness. The great test of criminal proof is to convince be-

yond a reasonable doubt, and a reasonable doubt is defined to be such a doubt as would be raised by a single material fact refusing to harmonize with a theory of guilt.

However, the truthfulness and accuracy of details are dependent upon the nature of the witness through whose testimony they are presented. In estimating before the jury the value of evidence it therefore is often essential to comment upon the quality of the witness. Unless this is of an exceptional nature it should never be mentioned. Argument should not be crowded with unimportant persons, nor presumption be entertained to strengthen evidence by praising an unassailed witness whose merits are not otherwise obvious. Never sow suspicions where none exist. Moreover, an isolated attack upon a witness is a dangerous proceeding unless the charges can be made certain. It is much more risky to assail character independent of particular testimony than merely in relation to statements made by such witness. One of the most forcible methods of exposing character is through an account of the acts of the person. The hearer is left to draw his own conclusions from the facts. The dramatic element possible in such a portrayal is often made use of with great effect. A celebrated instance is that recorded in the killing in the White Chapel Murder Trial.

Many cases show that innocent witnesses are frequently unreliable. Defective senses in receiving the impression may be responsible, or a faulty memory may not be able to recall. Usually the ordinary memory is so overcrowded with data that it may not at once respond to every association. In cases where the witness is manipulating his memory to serve his own purpose the following rule is to be followed. Even a defective memory will be impartially defective to significant and insignificant facts alike, so also less important details will fade before more important events. A question put to the witness why his memory recalls one and not the other when the reverse would be natural, or why his attention should

have been turned to a slight incident, when it did not to a much more important one, often proves disconcerting to the witness and suggestive to the jury. Much skill and ingenuity may be displayed by the advocate in explaining such puzzling and eloquent incongruities as well as in constructing them. In this field where physical order and mental laws must harmonize is a zone in which arises many an obstinate fact which turns the fate of a legal battle. All told, probabilities and improbabilities are much more likely to reside in little things than in generalities. And the peculiarities characterizing the details of the evidence are the things which, like Banquos' ghost, "will not down" in the jury room when the whole situation is being reviewed for the last time. Thus the proper reception, interpretation and assimilation of the details of the evidence which constitute the foreground of the case should be carefully provided for in the counsel's argument.

The Jury's Danger from Sophistry.

Although it be of no credit to the profession that a warning be sounded against the sophistry of advocacy, yet the perils which the cause of justice encounters from this source justifies some consideration of the subject. Intentionally or unintentionally, and many times under the vicious maxim that "anything is fair in war" counsel sometimes attempt to win a favorable verdict through the devices of sophistry. The field of such practice is, however, so wide that only a number of the more obvious forms which it assumes can be here mentioned. Of course no self-respecting lawyer will deliberately plan to mislead, but unfortunately not all practitioners maintain a high ideal of ethical practice. No explanation will be made of the species here mentioned, beyond what is essential to identify their several characters. A classification of the same into groups would scarcely prove

profitable, so that a miscellaneous enumeration will be all that is appended. Such a study should be of value only as a defensive measure against imposition and fraud, and the employment of such tactics ought to be discountenanced by every member of the profession.

Examples of Sophistry.

1. The asserting as a fact or assuming as a fact something which is not in evidence or which is in disputed territory.
2. The statement or assumption of principles as law which have no such status.
3. To imagine and portray a false situation in lieu of the actual situation.
4. The concealment of a part of the facts under the claim of presenting a full account.
5. The misstatement and misquotation of testimony.
6. To assume that a witness has said more than was said.
7. To refer as if by accident or forgetfulness to matters prohibited by the court.
8. To make false references to authority or to authority upon questions merely analogous.
9. To assume weak arguments never made by the opponent for the purpose of demolishing them.
10. To assert vicious or preposterous grounds as advanced by the opposition when no such claims have ever been made.
11. To intentionally separate details which belong together in order to produce confusion.
12. To make a single argument seem two or more by adroit restatement and application.
13. To evade the force of truth by unmerited ridicule.
14. To shift the ground of contention without notice of so doing in order to gain an advantage.
15. To shift attention from the nature of the testimony to the character of the witness when the attribute attack bears no relation to the truthfulness of the evidence.
16. To shift attention from the question of the truth of

the point when the same is in issue to its consequences only.

17. To account for the apparent strength of the opponent's cause in the ability of the counsel when this is not the real cause.
18. To make suggestions which have no real basis in fact.
19. To hint at conclusions of a derogatory nature which might be drawn.
20. To insinuate the existence of facts which are not relevant in evidence.
21. To attack character without foundation therefor or logical relation.
22. To forestall correct interpretation of instructions to the jury by statement of principles in antagonism to the same.
23. To purposely divert the attention of the jury from actual issues to merely incidental matters.
24. To break up the unity of the opponent's speech by unwarranted interruptions.
25. To becloud the case by many words and the use of terms which while similar are not identical in meaning with those employed by the opposition.

Methods of Argument.

Much depends upon the skilful selection of a proper basis of method by which to argue the facts of the case after they are before the jury in evidence. Somewhat analogous to the election of a proper remedy by which the most advantageous position may be secured, so too the peculiar set of circumstances and the state of the testimony will almost always yield better and clearer results from one method of handling than by any other. And there are at least seven well defined types of organization besides an innumerable number of combinations possible from among these. Especially may there be noted the logical, chronological, testimonial, cause and effect, congruity, comparative and eliminative methods of argument. These types are in the nature of

general plans for presenting the argument, some of them being in themselves no form of argument, but outlines for arranging material only, while others have the added value of constituting also, within themselves, definite species of argument. The logical, chronological, testimonial and comparative methods illustrate the former, and the methods of cause and effect, congruity and elimination the latter. No rule can be laid down for the correct selection from among these plans, except that experience will in time enable counsel to estimate from the peculiar caste of the facts and situation in general which species of formula is best adapted to the prominent phases of the case. It is essential that the case be comprehended from a strategic point of view. The campaign of argumentative warfare must take into account the points of advantage and disadvantage, together with an unerring appreciation of what the points of greatest importance in the particular case are. Nothing but a complete grip upon the details of the case as a whole will furnish a reliable clue to the solution of the problem. By the time the evidence is all in the counsel should have his argument mapped out and briefed ready for delivery.

THE LOGICAL METHOD.

The logical method prevails where one issue stands out prominently as the one upon which the cause will stand or fall and where the evidence is arranged in a climactic order of strength to the support of this paramount issue. The method likewise obtains in cases where there are two or more issues of apparently equal force in the evidence.

The principle of arrangement here adopted is that of the order of increasing strength with which each particle of evidence bears upon some main issue. When possible this system aims to concentrate all material toward one paramount proposition. Such proposition is, or should be, revealed

clearly in the pleadings. This plan in its ultra logical form will drive all evidence to the support as directly as possible of the main allegation in the pleading, but when such arrangement seems too formal will generally be more effective in dropping down merely to the proof of those subissues which together are the ground upon which the more formal declaration stands. Usually the jury will be able to see that the proof of these issues is equivalent to the proof of the main proposition without the need of counsel formally showing what such connection is. At least a brief summary of the relation is usually sufficient where there are several of them, and where but one or two exist, even a summary is frequently unnecessary. Such an arrangement ignores time sequence, order of the witnesses or relation of evidence to particular witnesses, overlooks grouping by cause and effect does not isolate inconsistencies, spends no time in comparing evidence and works toward no especial elimination of theory. It is a straightforward positive moving with ever increasing weight of evidence toward a single goal. When well made it has great cumulative power and convincing effect. Its total strength lies in the logically connected chain of inferences built up, but these inferences and connections must be rendered perfectly clear and cogent, and require a high order of skill in language expression and clarity of reasoning. The logical method is more often adapted to civil than to criminal cases.

THE CHRONOLOGICAL METHOD.

While the logical method is the most difficult of all to master, the chronological is one of the simplest. Beginning with the first pertinent fact the evidence is explained, emphasized and interpreted in the natural sequential order of the happening itself. This plan adopts the order of evidence supplied by the unfolding of the facts themselves. The

method has two advantages: first, in the fact that it is easily followed by the hearer, and second, that it gives a perfect impression of completeness when properly done. In some cases, too, it is admirably suited to the situation. Criminal trials based largely upon circumstantial evidence sometimes afford an excellent field for the use of this simple method, for the effectiveness of tracing step by step the movements of the accused from the time when the crime had not yet been committed to a date subsequent to the deed is obvious. Moreover the certainty of this inductive advance, closing up as it does, all avenues of escape behind, is full of dramatic suspense and thrill, and if the narrator follow his trail in masterly form, the effect upon the jury will be one of the most absorbing attention and conviction. However, the very strength of the method is at the risk of as conclusive a weakness. It either succeeds admirably or it fails just as miserably. If after the chain of events have been welded into the most unescapable certainty, it turns out that one link at a critical place breaks, then the whole argument vanishes. Thus it can never be made strong enough to exclude a reasonable doubt, if it does not hold together in toto. It is a method of elimination based upon the soundness of the whole. For this reason it is never wise to make this method stand out conspicuously unless the chain of events is complete and well reinforced at every joint. As can be readily seen, this method is not applicable in many cases where the movements of different persons intersect or combine, for it presumes a situation in which a particular individual may be isolated and traced in a relatively independent course of action. Of course the general order of facts as they occur may be followed in other than criminal cases with more or less success, but it does not possess the peculiar cogency found in these cases.

THE TESTIMONIAL METHOD.

The testimonial method consists in taking up the evidence for analysis and argumentative purposes in witness units. The evidence of each witness is reviewed as a whole, and by itself, and the personal element of value is emphasized. This method has the advantage of great concreteness, and is very serviceable where the witnesses are exceptionally strong or exceptionally weak. The identification of strong or weak evidence with a particular individual serves to permanently fix it as well as its dominant characteristics in the minds of the jury. Some cases are peculiar in the sense that the vital evidence will be segregated in particular individuals and it is then that this plan of unfolding evidence is peculiarly effective. To destroy the force or integrity of a particular witness is, not infrequently, equivalent to winning a case. Trials, however, in which much evidence from many witnesses is necessary to build up a case, can not be treated effectively by this method. Here, too, as a subordinate process elimination may sometimes be used advantageously. Thus the character of one witness after another may be impeached so that the untarnished is reduced to a single witness or two. In order, however, for the testimonial method to work out successfully, two things are essential: that there be but few important witnesses, and that the evidence be segregated in single individuals. Where evidence is capable of corroboration, it is manifest that its power is not extinguished by the destruction of a witness, and it seldom occurs that many witnesses in the same case can be successfully attacked. Moreover, a danger lies in arousing within the jury an antagonism to what may appear to be a wholesale onslaught upon character, but it is to be remembered that there are grounds of physical infirmity and physical impossibility of time and place, which are even more destructive of the value of testimony than moral delinquency itself.

THE COMPARATIVE METHOD.

This plan seeks to utilize the value of comparison and contrast. To use one witness as a foil to set off another does more than reveal the weakness of one and the strength of the other, it also emphasizes the difference by the heightening effect of contrast. So also it serves admirably to bind the testimony into convenient units for purposes of recall. When the evidence has been paired off in a series of comparisons each couplet will stand out distinctly in the minds of the jury. The use of this method, however, is somewhat limited, for it is not often that the one side can uniformly compare each of its witnesses with that of the other to advantage. The strongest witnesses are not likely to be massed upon one side. Sometimes a process of elimination may also be employed successfully by removing in turn each pair of witnesses which seem to balance in weight, until but a single one, or two, or three are left, after which these are disposed of by a different method. Thus the comparative system may endeavor to contrast pairs, or to balance them, or more likely still, to combine these two processes. This plan recommends itself on account of the concreteness of the method, its vivid personal character which will hold the attention of the jury, and the ease with which the testimony can be recalled in the jury room. Its weakness lies along the same sources of danger as beset the testimonial method. In the adoption of such a treatment care should be exercised never to force the scheme upon the materials. The selection of an appropriate order should only be made after a thorough review, scrutiny and estimation of the material. Otherwise in case of a misfit, a keen opponent may use the very means you have employed to destroy your own case. To avoid disaster of this kind the advocate must not become too partial to any one method, but should acquire the ability and readiness to use any or a combination of them as occasion may require.

THE METHOD OF CONGRUITY.

In this process we have a method which aims to prove its case as a whole by a critical analysis of the consistency among the facts testified to. We have already had occasion to observe that nature is a perfectly working and fitting piece of work, and one of the surest proofs of error in evidence is to disclose some incongruity or inconsistency among the facts. Now the counsel may not deem it necessary to review all of the testimony, but seeks out the places where defects exist and proposes to develop them and emphasizes them until they can not be overlooked nor overcome by the opposition. One stubborn and vital defect is sufficient to overthrow a vast amount of evidence otherwise harmonious. It is evident that this method is often of a negative and destructive nature, and yields itself particularly well to the defensive side of a case. When we consider that a criminal case must be proved beyond a reasonable doubt, and how potent an incongruity is to raise a doubt, we can appreciate the strategic force of this method. If in addition to one important contradiction others are added, the result will soon be that the case will be riddled by suggestions of further defects until to the jury the whole thing becomes a suspicious honeycomb of untruth. However, to handle this method effectively requires considerable observational and analytical skill. Few lawyers ever acquire the ability to so penetrate a labyrinth of fact as to disclose the hidden incongruities which exist. Moreover a nicely discriminative judgment is essential to know when an inconsistency bears a fundamental relation to the issue of the case, and when not. Such an unnatural position as a pistol grasped in the right hand of a dead man with the bullet hole entering the left temple, or vice versa, is at once perceived to be a very significant fact. Two forms of incongruity may be utilized in this process: the one being an inconsistency between the testimony of different wit-

nesses, and the other between testimony and the facts of nature deduced from this evidence, or coming under the category of judicial notice. The former includes the possibility of both being false, or of one being false and the other true, with the need still remaining of showing which is the true and which the false; while the other is conclusive against the validity of the testimony. One great value of this method is the concentration of the mind of the jury upon a limited field, and the directness of its attack upon a critical weakness. The plan may also be used to construct a positive argument by showing the perfect manner in which the different facts dovetail together. Usually an attack upon the lack of unity in the opponent's case is followed up by a supplementary exposition of unity in the theory supported.

THE METHOD OF CAUSE AND EFFECT.

One of the most natural, simple and effective methods of organizing evidence for argumentative purposes is that afforded by the relation of cause and effect. It yields a tremendous leverage in forcing the mind to a conclusion, for the mind, however untrained and elementary in its mode of thought, can not escape the logical cogency of a canvass of facts which furnish an adequate cause, disclose an opportunity and finally reveal subsequent results which find no solution or explanation except upon the basis of the validity of the preceding circumstances. To begin with the very roots of an act and to corroborate the act by its own peculiar fruitage is a twofold compulsion of inferences which, when well made, is well nigh irresistible. The plan is obviously best adapted to criminal actions, or offenses which have been the outcome of definite motives and forces. The three phases of the problem involved, namely, an adequate cause, a sufficient opportunity and inevitable results are so intimately related together that each must be made a special issue and clearly

shown. A crime without a cause, without an opportunity and without results is unthinkable. Nor is the establishment of these steps by any means an easy task, for causes are many times complicated and subtle in their nature. To prove a cause requires that it be isolated, that it be commensurate with the act and that it be effective. The latter involves the elimination of not only physical but spiritual obstructions and impediments. The opportunity to commit an act must be shown beyond mere possibility, beyond even probability—it must amount to moral certainty. Then, too, the events which follow should show positive color of crime. Facts must not be significant only by force of imagination or strain, but should spontaneously bear the stamp. The method, while therefore simple in its outline, is none the less difficult because of this advantageous feature: An address, however logically unfolding these successive phases to the jury, is bound to cover the essential issues in a way that the jury can not fail to grasp and fully hold and appreciate. When adaptable, no other plan of organization is superior in unity and argumentative power.

THE METHOD OF ELIMINATION.

Occasionally a case arises of such a nature that its solution may be reduced to a very limited number of possibilities. Usually these must not exceed three or four if the method is to be convincing. Having succeeded in showing that these and only these hypotheses are tenable, the next step is to eliminate one after the other of these until but one remains. The effect is then further strengthened by showing that this theory is in full accord with the evidence deduced. This method may not necessarily be applied to the direct question at issue, but more often to a subsidiary issue which in turn will decide the case. This process, while exceedingly effective and strong in dramatic interest, is somewhat hazard-

ous in application. Like all those methods which are in themselves a form of argumentative inference, if it fails in part it fails utterly. The first difficulty is to actually show beyond a reasonable doubt that no other possibilities than the ones mentioned exist. Sometimes it can be safely done, but unless this step is almost apparent on its face the method is an uncertain one. To be convincing to the advocate himself is not sufficient, it must be absolutely convincing in this first step to the jury. The force of the argument rests wholly in confining the possibilities within a circumscribed sphere, from which the inference can not escape. Although this is seldom possible, when it is, no other argument is its equal in convincing power.

The Form of the Jury Brief.

The forms of the jury brief in its more general features are capable of uniform treatment, but the wide range of the materials falling within its scope renders it susceptible of many subvarieties which must be adapted to the wants of the occasion. However it always embodies three distinct divisions, namely, the introduction, argument and the conclusion. The former prepares the hearer for a favorable and intelligent reception of the argument, while the last division sums up the discussion and draws the final inferences.

THE INTRODUCTION.

The subdivisions of the introduction need not vary whatever the course of the argument to follow, although some of its divisions may be omitted when no material pertinent to the heading arises and this may occasionally occur. And although this brief is intended to aid the counsel in systematically preparing his mind and memory for an oral address and may never be read by anyone else, yet this is no reason why it should not be made out with the greatest of care. For the old saying, "that the more preparation behind the scenes the less trace of it before the scenes," holds true of legal addresses quite as much as to that of any other form

of public performance, and in many cases much more so. The primary object of this brief as of all briefs is to systematize an argument. The interpolation of the logical steps in this process with material calculated to arouse the emotions can not very successfully be indicated by a brief. Sometimes such clothing must be chosen upon the spur of the moment and frequently a change of raiment must be made upon very short notice. When the logical development has been thoroughly systematized and mastered, the advocate is enabled to adjust his expression and imagery to the changing vicissitudes of the hour of speech itself, but if not he flounders midway between argument and feeling and ends up in producing no definite and convincing impression. But the brief does not altogether ignore the element of feeling and one of the first things it provides for in the introduction is the matter of adjustment between the speaker and the jury. The advocate wants no personal prejudices or bias or false impression, or cause of suspicion, or idle curiosity to stand between himself and an impartial hearing if it is within his power by a few words to prevent it, and if by a paragraph he can win a cordial response it is even better. Such remarks are provided for under the head of adjustments. Sometimes adjustments relate to the speaker, sometimes to associational conditions, and sometimes to logical relationships.¹ Particularly under the latter there may be pressing need to make a statement of the origin of the case and a brief epitome of the facts admitted. Many times it is highly important to furnish some explanations of terms or other things in order that the argument may be better understood. Thus an estimate of the value of circumstantial evidence may be timely, or a caution not to mistake the attitude toward the defendant in a criminal prosecution during the trial, or indeed many others.

So too it is often wise to point out in advance the irrelevance of certain matter to the settlement of the case where it is of especially dangerous character. Of course such explanations are presumed to be strictly within the provisions of the law and should never overstep the bounds of strict legal procedure.

¹ *Gibbons v. Ogden*, 19 Wheat. (U. S.) 1, 6 L. ed. 23; *White Murder Trial*; *Prentiss Address in Wilkin's case*; *People v. Darrow*—*Plea of Darrow in his own defense*. Golden Press.

Finally the introduction should close by giving a skilful derivation and cleancut statement of the issues to be proved. These will depend in number and character inevitably upon the nature of the case, but nevertheless only the pivotal, and hence most important things should be given. Whether these are general in nature or a question of concrete detail can be determined only by an analysis of the case. Whatever their form they are usually few in number and of co-ordinate rank in the argument to follow.

If the introduction is well drawn it has placed before the hearer or reader all that is necessary to a fair and complete understanding of the body of the argument without any further deviation or interruption for such purpose. This effect is the test of a good introduction. The introduction should never contain matter which will itself precipitate discussion, but always remain upon ground admitted beyond question by both parties. Therefore the issues should be so clearly drawn as to practically exclude contention with reference to their proper relation to the case, or at least it must produce this conviction in the minds of the jury. The following rules apply to the construction of this part of the jury brief:

- I. Should contain all the information necessary to an understanding of the argument to follow.
- II. Ideas bearing upon the truth or falsity of the main issue should be phrased tentatively so as not to provoke argument.
- III. Do not argue in the introduction and hence even in explanatory matter never use the connectives "for" and "because", but rather such expressions as "in that", etc.
- IV. Make each part self-explanatory and hence refer to no ulterior references not universally known and remembered.
- V. Never fail to give the derivation of the issues and to see that the exposition is faultlessly clear.
- VI. Always state the issue or issues to be proved the last thing in the introduction and in the exact words to be afterward used in the argument.
- VII. Make the introduction a model of brevity and simplicity of expression.

THE ARGUMENT PROPER.

The second and principal part of the jury brief is that devoted to the argument or body of the discussion. We have already spoken of the need of a general plan of procedure for the benefit of the hearer. Details of evidence must be organized about certain centers of thought to prevent them from clouding the whole mental horizon. Such a framework is supplied by this portion of the brief although its machinery is extremely simple. Nevertheless the correct application of this simple scheme to the evidence of the case will tax the ability of the best reasoner. When once accomplished, however, the gain in order and effectiveness is at once apparent. The theory of the brief in this part is that all reasoning is a series of inferences terminating in one central proposition in somewhat reverse order by analogy to the root and branches of lineal descent. The main proposition is set forth in the beginning in the most succinct terms possible, taking care that the proposition is single and generic. By means of the special connectives "for" and "because" the logical relation between this proposition and the next immediate general proposition, or propositions, if there be more than one, upon which the main proposition rests or as an inference was taken, is expressly set out by placing the latter immediately below the former. Each one of these subpropositions is now separately and in the same manner connected with the second class of subpropositions upon which they in turn immediately rest. This process is continued in case of each division until it is exhausted. When the whole system is completed the last propositions read as reasons for the ones immediately above, and these in turn to those next in order of supremacy until at last all converge as proof of the main proposition. But while in lineal descent the first and primary individual is the progenitor and parent of all that follow, on the contrary by this logical descent the many propositions are really together the parent and progenitor of the one final deduction with which the start is made. The brief therefore reverses the order of the mind in reaching its conclusion putting the result first and the reasons below. Usually in law the main proposition rests upon two or more co-ordinate subissues, and these become in turn each a sep-

arate and co-ordinate division of the argument, so that the discussion as a whole will consist of a series of co-ordinate units of argument rather than all being unified under one head. This, however, is a matter of convenient form only since all must converge into proof of the main proposition whether it be formally placed at the head or implied in the background.

As to just how the issues will be best formulated must depend upon the method of treatment adopted. Seven distinct types or methods for the most advantageous basis of dividing the evidence have been pointed out in connection with their relative merits and disadvantages. Many variations and combinations are possible among these so that an advocate should not arbitrarily select one because of his familiarity therewith or because of its own character, but only because it is best suited to the particular subject-matter. Of course this assumes that counsel is able to use effectually any or all of the methods as occasion may require. There are a considerable number of technical rules governing the formal accuracy of this, the brief proper, all of which are valuable aids to clearness and cease to be formidable when once mastered. In fact they are the criteria for discovering the subtle errors which creep into reasoning beneath the covering of loose phraseology. No doubt the degrees of formality with which the brief may be worded may in some cases be overemphasized, but for the beginner the more perfect the form as a rule the more accurate the reasoning. Certainly, however, it is not expected nor desired that the oral address shall preserve the same stiff and formal presentation. The purpose of the brief is fully conserved when it has given to the speaker a mental picture of the relative position and value of the materials. For example, while the brief places principle first and proof following, the speaker will, with the exception of the main issues, probably follow the natural sequence of facts first and principles deduced as conclusion from them last. In fact, it may be that parts of the material even in the subordinate divisions of the brief might better be placed in the natural rather than the ultra logical order.

The following rules should be followed in producing a scientific brief of the argument, to wit:

- I. The issue or issues stated in the introduction should be repeated in identical form as the main head or heads of the brief proper.
- II. Each main heading or issue as it is called should be a reason for the truth of the main issue of the case.
- III. Each subheading should read as proof of the main heading under which it is stated.
- IV. The relation between a heading and its proofs should always be expressed either by the word "for" or "because", unless for special reasons a part of the argument be desired to run in inverse order when the connectives should be "hence" or "therefore", but the two should not be indiscriminately mixed and confused.
- V. Unless the logical order be especially important, co-ordinate headings should follow each other in the order of emotional or rhetorical climax.
- VI. Successive co-ordinate headings on account of intervening subordinate matter should be preserved in proper rank by repeating the previous co-ordinate heading when distance threatens the relationship by use of the correlatives "not only—but also". The effect of this device is to keep the matter summarized and to preserve the cumulative effect.
- VII. Co-ordinate headings or propositions should be connected by the connectives "and" and "also" except the headings that are the main issues which should for convenience be marked Issue I, Issue II, Issue III, etc.
- VIII. Any material wholly emotional or for illustrative purposes only when important should be enclosed in brackets where intended to be introduced and not numbered.
- IX. It is usually best to place co-ordinate connectives at the lefthand margin where the proposition begins and subordinate connectives at the righthand margin where the proposition ends.
- X. All headings should be reduced to simple propositions, and all reasons should also be formulated into propositions. Isolated words and phrases are neither evidence nor capable of proof.

- XI. When possible, it is best to divide the general argument into two bodies of evidence, the one being wholly positive in character and the other wholly composed of refutation. However, where refutation is both of a general and special nature the former should be placed in a body by itself usually preceding positive argument, while the special refutation should be ingrafted piecemeal where it arises, otherwise it will lose its bearings.
- XII. Argument in the form of refutation should always be prefaced by a statement of the exact proposition to be refuted and hence introduced by some such correlating phraseology as "although it may be held", "yet this is not true", etc.
- XIII. The refutation form should be adapted to the exact quality of the positive clause and its denial, namely:
 "Although it may be suggested", "Yet this is not certain", not incorrect, etc.
 "Although it may be contended", "Still this is untrue", is false, etc.
 "Although it may be affirmed", Nevertheless this is too sweeping.
 "Although it may be said", However this is contestable.
 "Although it may be held", However this is not the case.
 "Although it may be advanced", is absurd, proves too much, etc.
 "Although it may be advocated", is mistaken, is extravagant, etc.
 "Although it may be argued" is not tenable, is equivocal.
 "Although it may be insisted", etc., is ambiguous, is presumptive, is overdrawn, will not hold, can not stand, is misleading, etc.

THE CONCLUSION.

The conclusion in a jury brief admits of little or no variation in form. Its function is merely to gather up the several issues or headings which have been proved and to emphasize their relation to the primary issues in the case. It is a sum-

mary therefore of the logical solution of the advocate's side of the question. As to just how many ranks of headings shall be reviewed, or to put it differently how deep down toward the details the summary shall go, will in all instances depend upon the complexity of the case. It ought never be labored, but exceedingly terse and to the point. There should be no effect of a postscript argument or afterthought appended. The place and time for argument are passed. What the hearer wants to know is, What now in a nutshell is the outcome of the whole discussion? Such a result should therefore be forthcoming with a cogency and ring of decisiveness that will bring the address to a conclusive close. There are also a few rules to be observed in the construction of this part of the brief, to wit:

- I. The conclusion should state concisely the steps by which the conclusion or primary issue is proved.
- II. The logical conclusion here stated is not one of the issues or main headings of the argument, but the first proposition or primary issue of the case toward the truth of which the issues are reasons.
- III. Only the most important classes of headings should be summarized unless further details are crucial to the case.
- IV. If one of a class is repeated then all of the headings of that class should be repeated in such approximately identical terms that their recognition is unmistakable.
- V. The headings should be given in a series first and the conclusion derived from them last, the former being introduced by the term "since" and the latter by the terms "therefore" or "hence".
- VI. This part of the brief should merely draw the final inference and never append further material either to qualify, annul or change in any way the argued headings or conclusion.
- VII. Where there is both refutation and positive evidence, the former should be reviewed in a body first and the positive argument last, the deviation from one to the other being made by the use of the correlatives "not only", "but also".

General Rules.

In addition to the foregoing special rules governing the particular division of the brief there are also a number of general rules observed in all good briefs, to wit:

- I. All language must be reduced to the simplest propositions—no phrases or dependent clauses should be used either as proposition or evidence.
- II. There must be no vague phrasing capable of wrong meanings either by ambiguous construction or wrong placing of emphasis.
- III. One heading should consist of but one proposition and not a compounded expression capable of separation into two or more distinct propositions.
- IV. Co-ordinate heads should be scrutinized with great care in order that they may prove truly co-ordinate and upon the same basis of division.
- V. All headings should stand for distinct ideas and not be overlapping each other's territory.
- VI. Avoid the use of present active participles and reduce all conditional expressions to adjective modifiers when possible.
- VII. Never mistake a restatement of the proposition for a reason thereof, or an illustration for an argument.
- VIII. Do not intermingle the order from proposition to reason with that of reason to proposition since it produces confusion, nor confuse causal with sequential connectives.
- IX. Every heading should have a particular number and be begun in its own indented margin depending upon the degree of subordination.
- X. Never double mark a heading.
- XI. Never use a subordinate connective between the premises of a syllogism.

THE LOGICAL PLAN.

The following outline is based upon a hypothetical set of facts in order to illustrate the numerous subordinate forms of reasoning which may dovetail together under this plan in

a single case. The circumstances here assumed are that a dwelling house partly submerged by a flood upon the low grounds of the Ohio River in the suburbs of a town during a clear night is burned. The defendant was seen in the vicinity in a boat late in the evening and was known to have had an altercation with the owner some time before. The house had been practically stripped of its furnishings upon the advance of the high waters.

It is observed here that the main proposition that the defendant is guilty of arson is deduced from three main subordinate reasons which become thus the issues in the case, to wit:

1. The defendant was at the place.
2. The fire was caused by human agency.
3. All other explanations fail.

These issues are in turn supported by various species of argument, such as analogy, example, authority, cause and effect, congruity and incongruity, interpretation and elimination. The whole effect in this instance is one of circumstantial cogency. Whether the prosecution has made out a sufficiently strong case will be for the jury to determine.

From an argumentative point of view the case has been well argued in proportion to how forcible the facts in evidence have been made to reinforce the main proposition through skilful development and organization. An able advocate will often develop an astonishingly effective and convincing argument out of what appears to be very unpromising material. All great criminal lawyers are exceedingly fertile in the art of making small details talk. Webster's masterly handling of circumstantial evidence in the White Chapel Murder trial proves that he was not only a great constitutional lawyer, but a consummate criminal advocate as well. And to make the most of details requires a flexible use of every species of argument.

ILLUSTRATION OF A JURY BRIEF. I.

Logical Plan.

CASE OF STATE OF OHIO V. JOHN DOE.

THE DEFENDANT IS GUILTY OF ARSON.

INTRODUCTION.

I. PRELIMINARY MATTERS:

A. Personal.

(1) State unusual circumstances connected with employment as counsel, if any.

(2) Physical condition of voice when exceptional.

B. Associational.

(1) Accident of time.

(2) Inconvenience of place.

C. Logical.

(1) Statement of the case.

(2) Important explanation and definition.

(a) Statutory and common-law distinctions relating to arson.

(b) Value of circumstantial and testimonial evidence compared.

(3) Irrelevant and immaterial matter.

(a) The defendant's previous character had no bearing upon the present case (may be important to plaintiff or defendant).

(b) That the defendant did not himself set the fire is immaterial (if plaintiff brief).

That the defendant refused to testify is immaterial (if defendant brief).

II. DERIVATION OF THE ISSUES:

A. What things and why, if proved, will convict the defendant (if plaintiff brief).

B. What things and why must be proved by state, what facts will be sufficient in law to refute—the burden of proof—presumption (if defendant brief).

III. STATEMENT OF THE ISSUES:

A. Issue I. Was the defendant in the town on the said date?

- B. Issue II. Was the fire caused by human agency?
 C. Issue III. Do the facts exclude any other hypothesis?

THE ARGUMENT PROPER.¹

THE DEFENDANT IS GUILTY OF ARSON BECAUSE:

- Issue I. The defendant was at the place of the fire at the date of the burning, for,
- A. All Y is Z and (major premise) Deduction.
 all X is Y. (minor premise)
 - B. All A is B and (major premise) Deduction.
 all B is C (minor premise)
 - C. All V is W (major premise given with
 minor premise understood).²
 - D. Some P was Q (minor premise with major
 understood).
 (Description identifying P & Q), for
 - (a) P displayed the same effects, for
 - 1' effect a was present.
 - 2' effect b was present.
 - 3' effect c was present.
 - 4' effect d was present.
 - 5' effect e was present, etc.³
- Issue II. The fire was caused by human agency, for
- A. It must have been caused by human agency
 or accident, and
 - (1) Accident was out of the question
 (explanation of situation).⁴
 - (2) The defendant was in town and de-
 fendant was an adequate person, for
 - (a) He had a motive for the crime.
 1' he was angry at the owner.⁵
 - B. It was identical in circumstances with case
 of H, for
 - (1) A in II was equivalent to A' in this
 case.

¹ Plaintiff, usually positive proof first and refutation last; while defendant reverses the order.

² Double Syllogism.

³ Argument a posteriori from sign ' induction combined.

⁴ Argument by eliminative or alternative process.

⁵ Argument a priori, cause to effect.

(2) B in H was equivalent to B' in this case.

(3) C in H was equivalent to C' in this case.

(4) D in H was equivalent to D' in this case, therefore

5 in H was equivalent to E' in this case.⁶

C. a was b

b was c

and c was d.⁷

D. It is possible to time the ignition by natural combustion, for

(1) The case of *Brown v. Black* is an example.⁸

(a) Narration of the facts in this case.

Issue III. No other hypothesis is possible, for

A. The statute leaves no room for doubt in that it can mean only as follows: (Quotation of statute and comments.)⁹

B. The same question was raised in the case of *White v. Black*, in which Judge ruled as follows, and this ruling has been followed in the following cases, *A v. B*, *C v. D*, *F v. G*, and many others.¹⁰

C. The very situation and condition of the burned building precludes upon inspection the possibility of any other theory. (Description.)¹¹

D. The hypothesis of accident is full of incongruities, for

(1) It was a clear night and lightning does not exist in clear weather.

(2) It was an empty home and rodents do not infest empty houses.

(3) There were no combustible materials,

⁶ Argument by Analogy. (An exposition of likenesses.)

⁷ Deduction in form of sorites.

⁸ Argument by Example.

⁹ Argument by Interpretation.

¹⁰ Argument by Authority.

¹¹ Argument by Intuition.

- for the house was above the ground and flooded with water at the time.¹²
- E. All the important evidence points to a criminal act, for
- (1) a, b, c, d, e, f, g, h and i point to such a conclusion.¹³

REFUTATION.

Not only has it been shown that the defendant is guilty of arson because it has been proved

Issue I. that the defendant was at the place of the fire at the date of the burning.

Issue II. that the fire was caused by human agency.

Issue III. that no other hypothesis is tenable.

But also,

I. Although witness A declared (———), yet this can not be true, for

A. Witness A could not have known this fact, and

B. This witness also testified to the fact X which was shown to be false, and again,

II. Although some evidence has been introduced to prove Y, yet this evidence is of no weight, for

A. The counsel for the defendant picked up this witness along the railroad, and

B. The looks of the witness were enough to satisfy a reasonable man.¹⁴

C. Such a method of securing evidence ought to be repudiated by all good citizens.¹⁵

CONCLUSION.

Finally, since it has been shown that the declaration of witness A can not be true, and that the evidence bearing upon point Y was worthless, and secondly, since it has been proved beyond a reasonable doubt that

Issue I. The defendant was at the place of the fire at the date of the burning, for

Reasons A———

" B———

" C———

¹² Argument from Incongruity.

¹³ Argument by Induction.

¹⁴ Argument ad hominem.

¹⁵ Innuendo—ad populum.

Issue II. The fire was caused by human agency, for

Reasons A _____

" B _____

" C _____

" D _____

Issue III. No other hypothesis is tenable, for

Reasons A _____

" B _____

" C _____

" D _____

" E _____

Therefore it has been proved beyond a reasonable doubt that the defendant is guilty of the crime of arson, and such a verdict should be found by the jury in this case.

THE CHRONOLOGICAL PLAN.

The illustrative outline here given is presumed to have been formulated from the following facts covering a period of time from July 3, 1894, until August 2, succeeding. It appears that Martin Randall, a stock buyer, residing near Kewanna, Ind., was found on the 9th day of July murdered, his body having been pierced by a bullet and thrown into Walnut Creek, some eight miles from his home. The circumstances surrounding the tragedy actually involved the operations of two men, and their conduct and whereabouts from July 3 until August 2, when arrested, were eventually pieced out into a consecutive chain of events. The completeness of this chain may be gathered from the brief itself which makes these successive stages the emphatic points in the argument. It is plain that if each decisive move of the defendants' activity from the initial forming of a plan to the material carrying out of that plan a month later bears a systematic relation to the murder then it would seem to be much more than a matter of coincidence. In this case there turned out to be both a plan and a plot. The plot to murder in this instance was a part of a plan to go to the Klondyke. Many criminal deeds have a plot only and many more neither a plan nor a plot. Obviously where there is neither plan nor plot there is no background to connect criminally together a series of events so that the chronological method is at its strongest in the case where there is a well laid out and medi-

tated scheme. However, this is not always so. It will be remembered that in the famous California tragedy where two young girls were found dead and mutilated in the First Emanuel Baptist Church of Los Angeles, the movements of the defendant were traced with a deadly precision until the day of the supposed crime, when it was proved by the class book in the medical school which he was attending that he did not respond to roll call on that particular day. The plan was effectively employed in the above case without any material evidence of a plan or plot.

ILLUSTRATION OF A JURY BRIEF. II.

Chronological Plan.

CASE OF STATE V. ANDREW HARDING.

INTRODUCTION.

I. PRELIMINARY MATTERS:

- (a) Personal.
- (b) Associational.
- (c) Logical.
 - I. Statement of case.
 - II. Explanation and definition.
 - III. Immaterial and irrelevant matter.

II. DERIVATION OF A THEORY.

III. STATEMENT OF MAIN FEATURES OF THE THEORY:

- (a) The motive for the crime.
- (b) The opportunity suggested.
- (c) Preliminary preparation.
- (d) The conspiracy perfected.
- (e) Final preparation.
- (f) The commission of the crime.
- (g) The escape.
- (h) The results of the crime.
- (i) The confirmation of the crime.

ARGUMENT PROPER.

The defendant is guilty of the crime of murder as revealed by the series of occurrences taking place from June 5, 1894, and August 2, 1894, when the defendant was arrested at Seattle, Wash., when about to board a vessel for Alaska.

- I. The motive which prompted the defendant, in co-operation with others to kill Martin Randall on July 3, 1894, is fully revealed in the conversation which took place between the defendant and B and C in the Last Chance Saloon in Holland, Ind., on May 5, 1894.

What took place in that saloon?

- (a) There was testimony that the proposal was made that the defendant and B and C go together to the Klondike. That the proposal was agreed to provided that the capital could be raised.
 - (b) That the defendant and B stated that they had no money but "——" would get some.
 - (c) That there was great excitement over the news of the great strike.
- II. The second step toward the crime occurred just two weeks later when the opportunity to get the money was suggested to the defendant in the K State Bank on June 17.

What took place in that bank?

- (a) The banker testified that Martin Randall secured the promise of the banker to open the vault on July 4 (a legal holiday) and supply him (Randall) with \$900 to buy some cattle.
 - (b) That they talked rather loudly and for some time at the teller's window.
 - (c) It was testified to by several that defendant was present and seemed particularly interested.
 - (d) That defendant asked Solomon Fisher who Randall was and where he lived, and who owned the cattle in question and that these things were told him.
- III. With the definite suggestion of murder in his mind the defendant on the very next day, June 18, began his preparation for the deed in the store of John Bergstrom, hardware dealer, in Holland, Ind.

What did he do in this store?

- (a) He purchased a revolver and a box of cartridges.
 - (b) He said he was going to the Klondike and would need it.
- IV. Now what occurred next? Just what would be expected. The defendant sought out his confederate to

relate his good luck. On June 20, the defendant and his confederate were celebrating in Jim Morley's saloon.

Now what does the evidence show?

- (a) That these men were in high spirits.
 - (b) That they were drinking heavily.
 - (c) That they talked loudly of what they would do.
 - (d) Said that they would get "the old man's swag."
 - (e) Here is where the deed was definitely planned.
- V. The next step in the fiendish plot and the final preparation for the crime took place in Barnes Auto Livery at W in P County, Ind., just six miles from the spot where the victim was killed.

And what was it?

- (a) The confederate of the defendant, on July 3, appeared and presented a note signed by the defendant to the owner of the garage introducing the defendant as a friend and asking that the owner, for whom he had previously worked, let the bearer have an auto for a week and he (the defendant) would stand good for the expense.
- (b) The confederate went away with the machine. The plan was now complete.

VI. And now what occurred on that fatal 4th of July? Evidence shows:

- (a) That Martin Randall, at 5 o'clock in the afternoon, secured as per arrangement, the \$900 from the State Bank of Kewanna.
 - (b) That he had been drinking.
 - (c) That the defendant was seen near the bank at about that time.
 - (d) That an auto with two men was seen by the side of the road between Kewanna and the home of the victim after sundown.
- VII. Early on the morning of July 5 an auto with two men was seen driving rapidly in the direction of Logansport. The machine was very muddy. The conspirators were making their escape.
- VIII. On July 9 an auto was found 40 miles from the supposed scene of the crime.
- (a) It was later identified as the machine from W.
 - (b) On the same day the victim's body was recovered from the water of Walnut Creek.

- (c) There was no money on the person and there was a bullet hole through the body.
- IX. And finally the defendant and his friends were arrested on the 2d of August at Seattle, Wash., when about to set sail for Alaska.
 - (a) They had \$500.
 - (b) The defendant had a watch which was identified as having belonged to Martin Randall. This was the confirmation of the plot which had been so nearly carried to a successful end.

CONCLUSION.

Therefore, since we have shown the movements, step by step, of the defendant by the strongest evidence,

1. In forming a motive for the deed,
 2. In the opportunity suggested,
 3. In the preliminary purchase of a weapon,
 4. In the taking in of an accomplice,
 5. In the final securing of an auto to make their escape,
 6. In the evidence of an escape,
 7. In the evidence upon the body of the victim,
 8. And in the confirmation of the plot and crime.
- The defendant has been proved guilty of the crime of murder and should be so found in your verdict.

THE TESTIMONIAL PLAN.

The occurrence here complained of was the destruction by the police of the city of Oakes of a considerable amount of gambling property seized in a raid upon certain saloons which had become notorious for disorder. Since the confiscation of property under many conditions is contrary to law and especially the reckless and wanton destruction of the same the city was made defendant in a suit for damages. Naturally in a conflict of this kind two widely contrasted bodies of citizens are brought into collision. Men of opposing ideals, purposes, habits and vocations are arrayed against each other and the difference emphasized because involving a moral issue and social evil. Plainly then the legality of the act of the officers in demolishing certain gambling devices resting

upon a proper interpretation of the use and abuse of the general police power of the state and depending upon the circumstances and manner of the committed act the question was referred to a jury to say whether the situation justified the measures employed. It then became a contest between the value of the testimony taken. As might have been expected, the evidence was full of animosity and much of it diametrically opposed in statement. Inevitably the only way to weigh the testimony was to compare the sources of character from which it came. The most efficient method of doing this was by a process of comparison—witnesses of equal rank against witnesses of equal rank—as disclosed in the brief below.

More often a case will not balance sufficiently in the number and character of witnesses to make the comparative method adequate within itself so that a supplementary treatment is added. Individual testimony may be analyzed and its author's character dissected in isolated units until by elimination the opponent's case is broken down. Both phases of treatment combined usually constitute the testimonial method.

ILLUSTRATION OF A JURY BRIEF. III.

Testimonial Plan.

CASE OF WILLIAM HOWARD V. CITY OF OAKES.

INTRODUCTION.

- I. PRELIMINARY MATTERS:
 - (a) Personal.
 - (b) Associational.
 - (c) Logical.
 - 1. Explanation, definition, etc.
 - 2. Immaterial and irrelevant matter.
- II. DERIVATION OF ISSUES:
 - (a) The ordinance of Oakes against gambling.
 - (b) The raid of the police on Jan. 8, 1900.
- III. Issue I. Was the raid justifiable under the ordinance?
Issue II. Was the property destroyed gambling goods?
Issue III. Did the officers exercise due care?

ARGUMENT PROPER.

THE DEFENDANT IS NOT GUILTY OF CONVERSION.

- i. This is a case in which the forces of vice and disorder are arraigned against the forces of law and order. The result is that it amounts to a weighing of the value of the evidence on the one hand which is prompted by personal interest and selfishness against that on the other hand of disinterested public welfare. Thus we have the evidence of a saloonkeeper, a bartender and a half dozen gamblers and drinkers set over against the mayor of the city, the chief of police, and a half dozen law-preserving deputy officers.

Let us compare, witness by witness, the quality and spirit of their evidence:

A. The saloonkeeper's evidence.

1. How could he consistently claim any interference justifiable from his point of view of society?
2. Would he be likely to explain the real use of a gambling device?
3. Would due care to a man who considers all property legitimate and valuable be the same as to one who considers all gambling goods as worthless?

B. Compare this evidence with that of the mayor of the city, a man of excellent reputation and proper ideals.

1. Does a proper standard or an improper standard of duty to the people furnish the safest estimate of what the ordinance means and what is justifiable under the present conditions in this city?
2. Would not the mayor's experience, through several years' of service in dealing with such goods, qualify him to pass upon the general use of such paraphernalia?
3. Is not the mayor's judgment of the value of such goods more likely to be correct than one who is interested financially in the loss?

- ii. The conclusion reached in this comparison is all in favor of the City of Oakes. But, again,

C. We have the evidence of a bartender.

1. If anything, he is a less responsible and

reputable citizen than the saloonkeeper. He is a hireling to do the dirty work of a disreputable business.

2. What does he care if there be any ordinance at all—he is satisfied if he gets his pay—he has no family even to hold him to respectability. Can his testimony as to the character of the property be of any value?
3. As to the value of the property, he has never bought or sold any and measures its value only by the number of victims it may entrap. Is his estimate valid?

D. Set over against this testimony, if you will, that of the chief of police—a man whose business is to preserve order; picked because of his especial fitness—a reputable citizen in one of the most responsible offices of the state. What does he say?

1. He says the practices of this resort were constantly in violation of the rules followed in other saloons under the same ordinance.
2. He says this paraphernalia has always been held valueless in open market and commonly destroyed. He cites previous instances of such destruction.
3. He says that he had frequently warned this place of its violation and that he met resistance and was obliged to use force.

III. When we compare the testimony of these two witnesses we are bound to give more weight to the latter than to the former. There is no real comparison between the two.

E. And finally we have the evasive replies of a bunch of gamblers and liquor bums which the prosecution has brought into court.

- (a) The value of their evidence is best indicated by their principal business in life. It is worse than worthless. Size up the crowd and then compare their word with:

F. The group of men deputized to maintain law and order in this city.

- (a) Which of these sets of men are setting a proper example in life and which shows the self-esteem which makes a truthful witness?

- (b) Which of the two are respecting law and order and which violating it at every opportunity? Between these two, whose evidence should be preferred in this court?

CONCLUSION.

GENTLEMEN OF THE JURY: There seems to be no reason to review in detail the evidence in this case. We have here a uniform body of testimony from the witnesses of the prosecution denied uniformly by the witnesses of the city. It is a matter of choosing between the two. Both can not be right. Therefore, since we have shown by a comparison of the character of these witnesses that the word of the mayor of this city should and would everywhere be esteemed more valuable than that of a vice-propagating saloonkeeper, and since we have shown that the testimony of our chief of police ought and unquestionably is not in the same class with that of a stigmatized bartender and since the honorless statements of a bunch of bar loafers and gambling sharks should not even be compared with the testimony of the officers of the law, therefore we submit to a reasonable jury that the weight of the evidence proves that the charges against the City of Oakes are unfounded and a verdict should be rendered accordingly.

THE INCONGRUITY PLAN.

The facts of this case have been suggested from the somewhat recent malicious attempt to defame the character of a United States Senator in Washington, D. C. The story runs that the senator was making his way through the corridors of a widely frequented hotel when he was requested by a lady to step into a side parlor and be seated for a moment while she conferred with him upon a matter of public business. Graciously deferring to her request he found himself in a moment grasped and dragged towards a lounge while a series of outcries at once brought a group of people to witness the compromising situation. The senator protested complete innocence. He was later threatened with a suit unless certain concessions of a political nature were granted. To these overtures he refused absolutely to listen and pronounced the whole scheme one of deliberate blackmail. Upon

trial he was quickly vindicated. The most conspicuous feature of this set of facts is the series of glaring incongruities which it presents. It is not often, however, that such a situation arises—it is only where there is a total breach between fact and falsehood that such inconsistencies and in such numbers occur. The measure of inconsistency is generally the measure of fiction when the false claim is made to measure with the environment. Egregious lack of harmony in essentials begets the absurd, and nothing is more convincing upon the mind than an impression of absurdity. Only a fool will believe an absurdity, and a wise man will not consider one seriously. For these reasons the method of developing incongruities is one of especial effectiveness.

ILLUSTRATION OF A JURY BRIEF. IV.

Method of Incongruities.

CASE OF MRS. ADELINE CARSON V. AMOS PROCTOR.

THE DEFENDANT IS NOT GUILTY OF CRIMINAL ASSAULT.

INTRODUCTION.

I. PRELIMINARY MATTERS:

(a) Personal.

1. An honor to defend in such a case.

(b) Associational.

1. A strange inequality where one party has everything to lose and nothing to gain and the other everything to gain and nothing to lose.

(c) Logical.

1. Statement of the facts.
2. Explanation of the "rights of U. S. Senator in connection with appointments."
3. Immaterial and irrelevant. Any specific instance of conduct in previous years, etc.

II. DERIVATION OF ISSUES:

The obvious falsity of the charges in this case becomes apparent in a series of most palpable inconsistencies and incongruities. Truth is consistent and natural, falsehood artificial and ill-fitting. What do we find then as a test of this case?

III. STATEMENT OF THE ISSUES:

Incongruity I. The character of the man does not fit the act, for

1. It is inconceivable to associate a man with the misfortune of blindness with unrestrained violence of passion—Inhibition and self-control are characteristics of the blind. And

2. A man of family is seldom prompted to such an act. And

3. A man of high intelligence is seldom dominated by animal motives.

Incongruity II. Intimacy of such a nature as to form a basis for such an act is only the product of considerable time, but the evidence shows the parties to be practically strangers.

Incongruity III. Natural caution associates little loss with high risk, but here there is a combination of the greatest loss with the highest risk. A man holding a position of the highest honor and conspicuousness is alleged to have jeopardized all under circumstances of the greatest possible risk. Such a conclusion is absurd.

Incongruity IV. Ordinary intelligence seeks a private place for a serious crime, but here a public room in a public hotel is alleged to have been the scene of a private assault of the basest nature. This U. S. Senator must not, therefore, have even ordinary intelligence.

Incongruity V. Usually there are few, if any, persons so conveniently situated that they can become witnesses to an act occupying only a few minutes, but here there were several who appeared promptly upon the scene. What a strange coincidence.

Incongruity VI. Finally it is a marvelous congruity between the alleged act, if it be a malicious conspiracy, and the fact that both the plaintiff and all of the prosecuting witnesses were disappointed office-seekers or directly interested in the refusal of patronage by the defendant.

CONCLUSION.

GENTLEMEN OF THE JURY: Since the evidence in this case exposes to view the most absurd incongruities,

1. Between the character of the defendant and the act.
2. Between the duration of acquaintance and the intimacy assumed.
3. Between the exalted value of the position jeopardized and the high risk entailed.
4. Between the publicity of the place and the privacy of the crime.
5. Between the proximity of so many witnesses and their utility upon the scene.

And finally the significant congruity between the fact that all of the witnesses of the prosecution were office-seekers and all of them had been turned down by the defendant and the existence of a revengeful conspiracy to force the desired favor from the Senator or accomplish his ruin. For all of these convincing reasons you should find for the defendant in this case.

THE ELIMINATION PLAN.

The following crime was committed in the state of Indiana and was a celebrated instance of conviction upon purely circumstantial evidence and accompanied in the minds of many with a doubt of the accused's guilt. The defendant in the tragedy was a minister of the gospel in good standing, and at the time of the occurrence engaged in a series of revival meetings. He and his wife lived alone in the pastorate at the edge of the village. Upon a winter night between midnight and morning the minister spread the alarm that his house had been entered by burglars, his wife killed and himself roughly handled in a fight which ensued. No one heard the struggle or the shot. The wife was found dead in bed with a bullet hole through her head and the furniture of the room scattered about and overturned. The husband testified that an entrance had been made through a window. A snow of slight depth had fallen just before midnight and this became a telling circumstance in the trial.

Now a survey of all of the conditions attending the tragedy aroused suspicion against the husband himself, and he was tried, convicted and sentenced to the penitentiary for

life. Whatever may have been the course of the reasoning employed in this trial it is patent that it yields itself especially well to the process of argument by elimination. Some discrepancy and incompatibility of the statements of the accused and other known facts evidently not reckoned in his calculations established the fact that he was not telling the truth. If not, then he had a motive for such misstatements. Later on the proverbial "second woman" was discovered and a breach of parole by the accused several years afterward tended to convince the public that the verdict had not missed its mark. The possible theories in this case are singularly clear and compellingly inclusive, either.

1. The woman killed herself.
2. Or she was killed accidentally.
3. Or she was killed by intruders.
4. Or the husband committed the deed.

ILLUSTRATION OF A JURY BRIEF. V.

Method of Elimination.

STATE OF INDIANA V. MARTIN FORBES.

THE DEFENDANT IS GUILTY OF MURDER.

INTRODUCTION.

I. PRELIMINARY MATTERS:

- (a) Personal.
- (b) Associational.
- (c) Logical.
 - (1) Statement of the facts.
 - (2) Explanation and defense.
 - (3) Immaterial and irrelevant matter.

II. DERIVATION OF ISSUES:

The peculiar circumstances of this case make it clear that there can be but four explainable causes for the death of the victim, viz.:

III. STATEMENT OF THE ISSUES:

- I. Either the woman killed herself,
- II. Or she was killed accidentally,
- III. Or burglars were responsible for the death,
- IV. Or the defendant committed the deed.

ARGUMENT PROPER.

- Possibility I. The woman did not commit suicide, for
- (a) The husband testifies to the contrary, and if true, this would have been the easiest defense for him.
 - (b) The bullet entered the left and back part of the head, and she could not have inflicted such a wound.
 - (c) The wound was not powder burned.
 - (d) Evidence shows that she was killed while in bed.
- Possibility II. She was not killed by accident, for
- (a) The husband would have so testified.
 - (b) An accidental shooting would not have occurred while in bed.
 - (c) A minister and wife would not have been inspecting or displaying a weapon in the middle of the night.
- Possibility III. Burglars were not responsible for the death, for
- (a) A light snow having fallen in the evening the tracks of the invaders would have been left, but such evidence did not exist.
 - (b) Although the defendant testified that the deed was done by burglars, yet this is of little weight, for
 - 1. Some theory was necessary to divert suspicion.
 - (c) Although the disarrangement of the furniture might be held to indicate a fight with thieves, yet this is not significant, for
 - 1. The defendant may have so placed it.
 - (d) The weapon found was not such as a burglar would have carried.
 - (e) A minister's home would not be a likely place for burglars to seek treasure.
- Possibility IV. The defendant must have committed the crime, for
- (a) There were but four possible agencies and it has been shown that the first

is untenable, and the second was unreasonable, and the third was highly improbable, hence the fourth explanation must be true, but

(b) The last hypothesis is also supported by positive evidence, for

1. Testimony has been given that defendant had an adequate motive, for

(a) He was in love with another woman.

CONCLUSION.

GENTLEMEN OF THE JURY: Since it has been shown that four and only four ways were possible to account for the death of Mrs. Forbes, and since it has been proved beyond a doubt that she could not have killed herself, and that an accidental shooting is untenable, and that the nature of the facts destroy any possibility of the agency of thieves, there remains only one way and that is the guilt of the husband himself, and when in addition to the inevitable conclusion it is confirmed by evidence that a powerful motive existed for the crime, there remains no other course than for the jury to bring in a verdict for the state.

THE CAUSE AND EFFECT PLAN.

A plot more cunningly conceived and at the same time a part and parcel of real life is seldom perpetrated than the one here used to exemplify a method of argument. On the outskirts of a pretty little Iowa town lived a prosperous farmer. His home consisted of broad, productive acres, a splendid two-story residence, and a fine large barn and out-buildings with a full complement of good stock. The family regularly attended the village church and oftentimes returned with the young and handsome minister as a guest. Particularly was it noticed that the wife was especially gracious to her visitor. In due time rumors of a somewhat critical nature spread abroad as to her lack of discretion. Eventually came the climax.

It was the custom of this farmer to employ at least one hired hand, and at this time a somewhat reckless devil-may-

care spirited young blood was so employed. Suddenly the community was startled by exciting tales from this young man of repeated attempts made to steal a beautiful span of horses from his employer's stables, in one of which he had pursued them out into the highway and received a bullet wound through his ear as a result. The exhibition of the punctured member could not fail to produce a profound impression of truthfulness.

Finally upon a given night when the hired man had announced his intention of being away, the wife awakened the husband with the alarm that the thieves were again after the horses and that he hurry to the rescue. He did so, but when passing a small door near the stable was fired upon by a pistol at close range and missed. At this he retreated to the house, and while there was some agitation among the horses, none were found missing the next morning. Naturally there was considerable excitement as a result of this episode; the hired man went on a prolonged spree. While in this condition and in response to a shrewd companion who entertained a secret suspicion and had banteringly challenged him to a comparison of evil deeds, boasted unwittingly and at the casual taunt of why he had made such a blundering job this time, insinuated that a man in excitement will sometimes not take his time to do a thing properly. He was arrested and promptly convicted upon the following circumstantial theory:

ILLUSTRATION OF A JURY BRIEF. VI.

Method of Cause and Effect.

STATE OF IOWA V. LINK OVERMEYER.

THE DEFENDANT IS GUILTY OF ATTEMPTED MURDER.

INTRODUCTION.

I. PRELIMINARY MATTERS:

- (a) Personal.
- (b) Associational.
- (c) Logical.
 - 1. Statement of the facts.
 - 2. Explanation and definitions.
 - 3. Immaterial and irrelevant matter.

II. DERIVATION OF ISSUES:

The circumstances indicate that there was a two-fold cause of the crime, a carefully prepared opportunity and decisive results. Such proof constitutes a conclusive case of the act charged.

III. STATEMENT OF THE ISSUES:

- Issue I. Was there a sufficient motive to cause murder?
 Issue II. Was there an adequate opportunity to commit the crime?
 Issue III. Did the natural consequences of such a crime occur?

ARGUMENT PROPER.

- Issue I. There was a sufficient motive to commit murder, for
- A. The evidence shows a double motive, one the love of the victim's wife for the minister of the town and the other the desire of the defendant to marry the victim's wife and secure a fine farm and property.
 - B. The theory of the prosecution is that the victim's wife, in order to remove her husband, stimulated and conspired with the hired man, the defendant, to kill the husband on the promise to marry himself and he thus become the owner of the splendid farm. The woman was using the defendant as a mere tool. Evidence of the truth of this theory is as follows:
 (Here is reviewed evidence in support of the affection of the woman for the unmarried minister of the nearby town. Emphasis of the strength of these two motives, the one in a woman and the other in a man and the effect of the former stimulating by deceptive promise and encouraging the latter.)
 1. Evidence of the woman's infatuation for the minister as shown by church attendance and work and many invitations of the man to the prosperous farm home.
 2. Evidence of some indiscreet actions of the woman.
 3. Evidence of the handsome looks of the

minister and his innocence of any such motives.

- C. The conclusion is that the motive for the crime was doubly strong.

Issue II. The opportunity to commit the crime was also unusual, for it was

- A. Not only furnished by the most favorable circumstances, but was cunningly planned by the two accomplices under a plot to mislead the victim and the public.

- B. The theory of the prosecution, as supported by the evidence, is that the victim was to be inveigled to proceed to the barn during the night to protect his horses from being stolen and there killed by the supposed thief, namely the defendant, the hired man. The evidence in support of these facts are as follows:

1. The repeated reports of attempts of thieves to steal the horses in order to prepare for the final act.
2. Testimony of wife that she had aroused her husband on several different occasions—she was always first to hear the supposed thieves.
3. Failing to get the husband to go to the barn a final ruse was adopted, namely, for the hired man to announce that he was going away for the night.
4. Evidence shows that the ruse succeeded. The wife awakens the husband and urges him to save the horses. He does make the attempt, is fired upon at close range, and missed.

- C. The conclusion is that no better opportunity could have been desired for a fiendish murder free from suspicion.

Issue III. The evidence shows that the most natural effects of the attempted assassination followed.

- A. The theory of the prosecution is that the failure caused a quarrel between the two plotters and the loss of nerve in the hired man.

1. Repeated attempts to get the man (victim) to the barn caused the defendant to be overanxious and, being an amateur, he shot too hastily.

2. Seized with fear he shot a hole through his own ear in a supposed struggle with the departing thieves upon the highway in order to divert suspicion from himself.
 3. There were no tracks nor sign of a struggle where the supposed attack took place.
 4. Testimony of the husband of overhearing a quarrel between the two.
 5. Hired man became intoxicated the next day and continued to drink for a week.
 6. Evidence that he boasted when twitted by the detectives of other crimes.
 7. The defendant quit his work and attempts to make his escape without being too hasty.
- B. The conclusion is inevitable that a crime of murder was attempted, and having failed, broke up the plot.

CONCLUSION.

GENTLEMEN OF THE JURY: Since the evidence shows the existence of a powerful double motive for the crime alleged, and since an unparalleled opportunity was not only afforded by the natural proximity of the parties and the method devised of avoiding suspicion, and since the natural results followed, as would have been expected in the failure of such a plot, and since no such results followed as would have in case of an attack by thieves, therefore, the evidence proves beyond a reasonable doubt that the defendant is guilty of an attempt at murder and should be dealt with accordingly.

THE COMPOSITE METHOD.

STATE V. SWAILLIN.

In order that the form and complete organization of details may be shown more exhaustively than in the mere skeleton outlines already given, we append here a completely briefed case of a genuine murder trial which occurred only a few years ago. The names are changed, but the facts are

set forth and argued exactly as they were presented in evidence. The prosecution was conducted by a well known and able United States Senator and a conviction resulted. However, upon an order for a new trial and in view of the fact that the defendant was very old and feeble the case was dropped.

The case presents an unusual array of circumstantial evidence and affords an excellent exhibition of the advantage of systematic briefing in preparation for the oral argument. The briefs here submitted, however, were constructed from the evidence after the conclusion of the case and by the writer himself for illustrative purposes in the state law school and from notes taken during the progress of the trial. The evidence was extremely complex and strangely baffling of interpretation, presenting an unusual balancing of possibilities.

In order that the briefs may be the better understood we will give in some detail the facts in substance which were as follows:

The defendant was an old man approximately eighty years of age. He was a foreigner by birth and had lived in the community where the tragedy occurred for many years where he reared a small family, and by shrewd trading and hard self-denial and privations had accumulated a fortune estimated to be from forty to fifty thousand dollars. Much of this was in the form of bonds and bank deposits. His reputation in the community was not of the best. He was disliked and feared, known to be a quarrelsome man to neighbor with and suspected of having upon more than one occasion poisoned his neighbor's stock. Poison was always kept about his premises as he claimed for the purpose of destroying pests.

The home of this man was a one-roomed structure with an unfinished attic. In this primitive house his wife died as rumored from a lack of care and under suspicious circumstances. Thereupon he employed his son, an ignorant and dull-minded young man, to work the place at a very meager wage, and he himself made his abode with him, sleeping in a small adjoining shed. The son was married to a woman of foreign birth, accustomed to hardships and a low standard of living, but even she was distressed with her miserable conditions. For within this one room she became the mother of

three children, and to make matters worse a feeble-minded sister-in-law with two more children were moved to live with her in the same hovel. As a result the place became indescribably filthy.

It was at this juncture in affairs that the old man had stolen from a corncrib in which he had concealed the same a portion of approximately five hundred dollars in gold coin. He at once suspected his daughter-in-law, accused her of the theft and made plans to trap her in the future. About the same time a new set of dishes were ordered from a catalogue house, and the wife during pitiful protest of her conditions to her husband directed that in case anything should happen that Dora, the oldest girl, was to have the same. In a vein of abject despondency she also remarked that she might as well be dead, and it did not make any difference how she was buried, that a manure heap would be good enough for her. On account of these conditions there were no visitors at the place, and only once in a while did the poor woman visit her husband's relatives. On one of these occasions she inquired about placing her children in the care of others.

Moreover both the old man and herself were from long custom fond of ardent spirits, and the former had but recently ordered a consignment of the same which he doled out to her as fancy dictated. In her despair she was inclined to drown her misery by the use of liquor. Thus on the day before her death she had accepted some of this beverage from the old man and soon after became deathly ill. However she recovered within a few hours, but later remarked that the father had given her something that made her sick. On the succeeding day she was about in the forenoon as usual, but at the noon hour and while the meal was uneaten upon the table she went up into the attic, and not returning was soon after discovered there by her husband lying over a box in a semiconscious condition. The son soon after went for a doctor, leaving the father and her alone. Although the old man insisted that she was only drunk, the doctor pronounced her symptoms that of poisoning. After hours of agony, during which she replied to the question that the old man had given her poison, she died.

The old man still protesting that she had died from the effects of whiskey, proceeded to the attic and returned with

two bottles of partially emptied whiskey which he said that he had marked in order to discover whether she was stealing his liquor. These bottles were removed by the defendant and emptied. However, in contradiction to his theory there was no odor upon the breath of the dying woman and no traces of alcohol in or upon her body. Later a vial containing poison was claimed to have been found in the bed of the sick wife, but the coroner's search had revealed none. The little girl Dora, after considerable time had elapsed, reported that she had seen her mother on the previous day take something white from the cupboard, mix it with water and drink it. The actions of the defendant during all of these circumstances were somewhat unusual in character, but not altogether out of keeping with his generally calloused nature.

The briefs in question illustrate the effectiveness of combining more than one method in the same case. Thus the main form of argument relied upon is that of Cause and Effect, the issues set out for proof being those of: 1. The motive; 2. the opportunity; 3. the results of crime. But in the process of refutation the method of Elimination is introduced with good effect by emphasizing that:

1. The defense admits the cause to have been poison.
2. The defense also admits that it was not accidental.
3. Only two possible explanations are then possible, to wit:
 1. Either she poisoned herself, or
 2. The old man administered it, or
 3. Some third party did it, but

The latter theory is impossible, for no one was in the house old enough but herself and the defendant. Also some subordinate reasoning in the field of incongruity is excellently developed and a large amount of forcible deductive argument is employed.

ILLUSTRATION OF A JURY BRIEF. VII.

Prosecution.

IN THE PROSECUTION OF NATHAN SWAHLIN, INDICTED FOR
MURDER IN THE FIRST DEGREE.

INTRODUCTION.

I. PRELIMINARY MATTERS:

a. Personal:

1. The trial one calling for great patience and weariness on the part of all.
2. The commendable spirit of duty in the prosecuting attorney in an hour of great personal bereavement.

b. Associational:

1. The gravity of the case calling for the most serious and earnest consideration of all connected with it as counsel, court and jurors.
2. All equal before the law and the life of the deceased, however humble and little known, as sacred in the eyes of the law as that of "the first lady of the land."

c. Logical:

1. Admitted Matter:

- a. The prosecution, from the beginning, recognizes that the truth of the indictment alleged must be established, if at all, by circumstantial evidence.
- b. So also that the charge must be proved beyond a reasonable doubt.
- c. And likewise that the burden of proof rests upon the state.
- d. It believes that the admitted facts in the case are in substance as follows:
- e. That the defendant in this action, Nathan Swahlin, has for some time been living and making his home with his son upon the farm in township, county, Dakota. That the wife of his son, Mary Swahlin, was suddenly taken sick, and after a short illness, died, under circumstances of such a nature that the defendant was suspicioned of having administered to her death through the administration of

- poison. To this charge the defendant pleads not guilty and is therefore brought to trial.
2. Explanatory Matter:
 - a. Direct or positive evidence is clearly distinguished from circumstantial evidence. Illustration: From the nature of certain tracks made in the snow an inference could be made as to what kind of an animal had passed that way—this would be circumstantial. If, on the other hand, someone had seen the animal his statement of the kind of a creature would be testimonial evidence.
 - b. Circumstantial evidence has a double advantage over testimonial evidence in that the former coming from various sources and angles there is not the opportunity to fabricate or to report incorrectly through some impairment of the senses. It is a kind of evidence, therefore, upon which a conviction of guilt may clearly rest and the court will no doubt so instruct you.
 3. Irrelevant Matter:
 - a. It is a matter wholly irrelevant to this case that the defendant happens to be an old man and that he has experienced some of the hardships incident to pioneer days in Dakota. Right and wrong is no respecter of persons and justice would never prevail if sentimental considerations are allowed to prevail in the matter.
 4. A reasonable doubt is not the presence of a mere conjecture.
 5. Derivation of Issues:
 - a. Since the allegation in the indictment charging Nathan Swahlin with murder is the allegation of the existence of a fact in the form of an act and since this alleged fact in this case must be established by circumstantial evidence, and since the circumstantial facts from which the truth or falsity must be inferred are those of an adequate cause, those of the existence of no prohibiting obstacles, and those of the existence of concordant effects, therefore the question of whether Nathan Swahlin committed the

act as alleged in the indictment becomes whether:

- (1) He had a sufficient motive.
- (2) He had an adequate opportunity.
- (3) Incriminating results following the death.

ARGUMENT.

Issue I. Nathan Swahlin had a sufficient motive to commit the act alleged, for

1. The passion for money may be a motive for crime, for
 - a. Cases are on record where even a small sum has been sufficient. And
 - b. Nathan Swahlin had a passion for money, for
 - a. He had accumulated a large sum.
 - b. He had endured great hardships and deprivations to get it.
 - c. He had also subjected others to hardships to obtain it, for
 - (1) He employed his own son at a starvation wage.
 - (2) He provided but a single room house for a family of eight persons.
 - (3) He permitted his own feeble-minded daughter to go to the poorhouse.
 - d. He transferred a large sum of money into gold bullion in order that he might view it.
 - e. He secreted this money where he might gaze upon it daily.
 - f. The loss of some of this money caused him great pain, for
 - (1) He talked about it unceasingly before the daughter-in-law's death.
 - (2) And he even talked about his loss after her death.
2. Defendant believed the deceased was the cause of thwarting his desire, for,
 - a. He suspected the deceased of stealing his money, for

- (1) He had formerly suspected her.
 - (2) And he now suspected her, for
 - (a) He made such accusation, and
 - (b) He made three visits to his daughter-in-law with his story.
 - 3. Defendant feared the deceased would continue to make him unhappy, for
 - a. She was a member of his own household, and
 - b. She was dissatisfied with her privations.
- Issue II. But Nathan Swahlin not only had a sufficient motive to commit the act alleged, but also had a sufficient opportunity, for
- 1. He was able to give the drink of poison on Tuesday night of which Mary complained, for
 - a. He was in the house while Henry was doing the chores, and
 - b. He was able to give the poison on Wednesday, a short time before the deceased was found in the attic, for
 - (1) Henry was away to a neighbor's, and
 - (2) The children were out at play, and
 - (3) He was at dinner before Henry arrived.
 - 2. He was able to administer poison in the afternoon, for
 - a. Henry left him with her while he went for the doctor, and
 - b. Henry left him with her after the doctor had gone while he did the chores and went to a neighbor's for his relatives.
- Issue III. Again, not only did Nathan Swahlin have a sufficient motive and a sufficient opportunity to commit the act alleged, but the ensuing circumstances were such as the alleged act would have produced or occasioned, for
- 1. The deceased had stated in the defendant's presence that he had given her something the night before which made her sick. And
 - 2. Deceased stated on second request to send for the doctor that Swahlin had given her poison. And

3. Deceased's dying declaration, in answer to the question, "Did Swahlin poison you?" was, "Yes." And
4. Defendant persisted in saying that Mary was drunk, although in the face of alarming symptoms. And
5. He went and announced to, his daughter, that Mary was dead drunk even before he saw any such symptoms and before he had ascertained the facts. And
6. Defendant knew too much about the bottles, for
 - a. He took a bottle from under Mary's pillow.
 - b. He said he put it there to hide it from her.
 - c. He found two other bottles in the attic in the bottom of a box without any search therefor.
 - d. He said he knew the bottles because he had marked them. And
7. Contrary to his custom he bade Mary goodby shortly before her death and before going to his outhouse to bed. And
8. Contrary to his custom he was found on the night of her death in a house farther away than the one in which he usually slept. And
9. He instantly changed his theory of her death from whisky to that of suicide when the latter was suggested.

REFUTATION.

Not only does the evidence show a sufficient motive and a sufficient opportunity to commit the act, and incriminating circumstances as a result of it, but in addition, although it may be held that deceased might have come to her death in some other manner, yet the evidence does not bear out this suggestion, for

1. The defense admits that the death occurred from poisoning. And
2. The defense admits that it was not accidental. And
3. The theory of the defense that death occurred from suicide is not tenable, for
 - a. The evidence of such purpose was not clear, for

- (1) The deceased's statement about where she wished to be buried might have been to divert her husband's attention from her plan to run away. And
 - (2) The deceased's reference to burial was only as to the kind and place when she might die. And
 - (3) The deceased's statements were more in the nature of complaints at her lot and wishes for death than any expression of intention. And
 - (4) The statement about the disposal of the dishes was attributable to the thought of separating from her family by desertion. And
 - (5) Her visit to and on the previous Monday was openly in relation to disposing of her children, no doubt, to relieve the family of its congested and filthy quarters. And
- b. The defense has shown no immediate motive for suicide, for
- (1) She was not depressed by poor bodily health, and
 - (2) She had endured patiently for a long time, and
 - (3) She must have understood that much wealth would soon be inherited to compensate for the situation, and
 - (4) She must have had a mother's solicitude and love for her children and a desire to care for them, the one being little more than a babe at the breast, and
 - (5) She apparently had affection for her hard-working husband. And
- c. Although the little girl Dora testified to having seen her mother take something white from the cupboard and drink it, yet her testimony was wholly unreliable, for
- (1) She contradicts herself, for
 - (a) She put herself out of the house at the time when she claims to have seen things in the house.
 - (2) She failed to mention what she had seen for a long time or until after the search for evidence had ceased and her imagination had begun to work.

- (3) She had had frequent talks with Mrs. the defendant's daughter, and with the defendant about the matter of which she claims to be a witness. And
- d. The discovery of the bottle is under such unquestionable doubt as to be worthless as evidence, for
 - (1) Henry had slept in the same bed for two nights succeeding the death and had not discovered it in the bed. And
 - (2) A thorough search had been made at once by the coroner and by others for the particular purpose of looking for a possible vial, but without success. And
 - (3) The discovery was made by one who had been with the defendant for some time previously and therefore suspiciously.

CONCLUSION.

Since Nathan Swahlin had a sufficient motive for committing the act alleged in the indictment,

And since he had a sufficient opportunity to do the same,

And since such circumstances as might result from the committing of said act did happen,

And since the theory proposed in the defense has been shown to be untenable,

And, finally, since all other theories have been passed by as unworthy of consideration, therefore it follows that the allegation in the indictment charging Nathan Swahlin with murder in the first degree is legally true and the defendant is guilty of the murder of Mary Swahlin.

ILLUSTRATION OF A JURY BRIEF. VIII.

Defense.

IN THE DEFENSE OF NATHAN SWAHLIN, INDICTED FOR MURDER
IN THE FIRST DEGREE.

INTRODUCTION.

PRELIMINARY MATTERS.

I. PERSONAL:

1. The end of justice the only compensation for such a trial of patience and endurance.

II. ASSOCIATIONAL:

1. The issue of life and death always one to call out the utmost care and solemnity.
2. Always a pathos in a first criminal charge directed against old age in that
 - a. It leaves no time to live down.
 - b. Old age can not bury memory in action, but lives in the graveyard of reflection.
 - c. A parent's and father's good name goes down with the same sense of loss to society as the grateful protection of a great tree before the violence of a storm.

III. LOGICAL:

1. Origin of the Charge:

The facts in this case are, in brief, that on the ... day of, 1909, in the county of Clay, township of, in the state of Dakota, one Mary Swahlin, wife of a farmer, Henry Swahlin, while living together with her husband and family of small children in the house and upon the farm of the husband's father, one Nathan Swahlin, the defendant in this case, and while furnishing a home to the said Nathan Swahlin, did, on the date aforesaid, die, under circumstances and attended by circumstances of such a nature as to cause the arrest and indictment of the defendant upon a charge of causing the death of Mary Swahlin through the administration of a poisonous drug called strychnine, to which formal charge the defendant has plead not guilty, and stands ready for trial.

2. Important Explanations:

- a. But while the defendant stands charged with a serious crime it must not be inferred that he stands already under any measure of condemnation by the law—so far from this the law at this moment considers him innocent—the law not only prosecutes, but is the great defender of the accused and will not remove its protecting arm until the shield of a reasonable doubt is overcome. Nathan Swahlin, at this moment, stands before the law an innocent man and the law of this country tells the prosecution that no hair of his head shall be

injured unless his guilt be not only shown, but proved, not only proved, but proved beyond a reasonable doubt.

- b. The prosecution in this case must rely wholly upon circumstantial evidence, for even the words of Mary Swahlin herself are reported only indirectly through another witness, and the history of circumstantial evidence is one full of the most tragic mistakes. Eight years ago was hung on a charge of murder under circumstantial evidence of the most convincing and damaging nature and a few years later the actual murderer confessed upon his deathbed. The law books are full of its mistakes. Why?

(1) Its reliability depends upon two facts and thus doubly susceptible to error.

(a) The reliability of the witnesses.

(b) The correctness of the inferences from the facts.

- c. The defense is not only made stronger by this uncertain method of proof by the prosecution, but also by the fact that by the direct testimony of two witnesses it supports its own case and testimonial evidence is much more certain than circumstantial in that

(2) Its reliability rests only upon one condition in place of two, namely, the character of the witness, and this uncertainty can be almost totally removed by cross-examination, while circumstantial evidence has no way to cross-examine facts nor to prevent a fertile imagination from drawing any number of either probable or far-fetched conclusions. To one person the moon is as large as a wagon wheel, to another a wash tub and to another a quarter of a dollar. One glimpse of first-hand testimonial evidence through the telescope proves them all wrong.

3. Irrelevant Matter:

In the case under consideration, matters relating to the character of the defendant or of his relatives previous to the circumstances of

the trial or of the method of manner of life of these people are, as a matter of law, completely excluded from having any bearing upon the trial unless introduced as evidence under the strict permission and supervision of the court.

4. Admitted Matter:

- a. As a matter of law the prosecution in this case is under the burden of proving its allegations beyond a reasonable doubt, and such doubt must be overcome in proving each point upon which the truth of their case rests, namely, if the happening of a crime depended necessarily upon an adequate cause, then the prosecution would be obliged to prove the presence of an adequate cause beyond a reasonable doubt, if it also depended necessarily upon an adequate opportunity, then the existence of an adequate opportunity would have to be proved beyond a reasonable doubt. The prosecution must thus prove not only one but every necessary element to the crime beyond a reasonable doubt.
 - b. Both prosecution and defense must also admit as matter of law that a reasonable doubt requires something more than a mere conjecture or a speculative possibility to be raised by the defense—that would fall short; but on the other hand the prosecution has not excluded or shut out a reasonable doubt even when it has produced a preponderance of evidence in its favor, but must have so much of the evidence in its favor that there can not remain an open possibility of the contrary plus a substantial reason backing it up.
 - c. It is tacitly admitted in this trial that Mary Swahlin came to her death from the effects of strychnine poison administered into the stomach, the only question being as to who administered the drug.
5. Derivation of Issues:

Since the prosecution must prove the act alleged by means of circumstantial evidence it will be compelled to show a cause for the act, an opportunity to commit the same and cir-

circumstances which would have followed from such a motive and crime. No other method would exclude a reasonable doubt, hence the defense will first disprove

- a. That there was a sufficient motive,
- b. That there was a sufficient opportunity, and
- c. That succeeding circumstances tend to such a conclusion; and secondly the defense will raise a reasonable doubt by showing that Mary Swahlin committed suicide as shown.
- a. By circumstantial evidence through
 - (1) The presence of a sufficient motive,
 - (2) The existence of a sufficient opportunity,
 - (3) The results of such an act, and
- b. By testimonial evidence through
 - (1) The denial of murder by Nathan Swahlin,
 - (2) The affirmation of suicide by Dora Swahlin.

BRIEF PROPER—REFUTATION.

- Issue 1. Nathan Swahlin did not have a sufficient motive to commit the act alleged, for although it may be contended that the passion for money is a motive to murder and that there are cases on record where even a small sum has prompted the crime,
- A. Yet this argument is misleading, for
 - 1. The instances of crime induced by a small sum do not fit this case, for
 - a. Those were cases where the person committing the crime was destitute of means, and Nathan Swahlin had a hundred thousand dollars. And
 - 2. The passion for money is more often not a motive for crime, for
 - a. The passion for money generally results in riches, and
 - b. Statistics show that few wealthy people have committed murder for money. And

3. The evidence does not show Nathan Swahlin to have revealed exceptional fondness for money, for
 - a. He kept little of his money about him,
 - b. No evidence shows that he handled the money in question excessively, even upon discovery of theft,
 - c. He displayed no more than ordinary feeling over his loss. And
4. Nathan Swahlin could not have been agitated by the fear of further loss, for
 - a. Once suspected. Mary would not have dared to repeat the offense,
 - b. All that was necessary was to replace the money in the bank. And
5. No evidence shows that it was the practice of Swahlin to secrete money about the place. And
6. The evidence does indicate that it was for a temporary purpose only, for
 - a. A corn crib is not a permanent or indestructible place and the earth is; and
 - b. Nathan Swahlin used the less protected rather than the most secure place. And
7. The form of gold rather than paper or silver indicates nothing against the defendant, for
 - a. Any reasonable man would have avoided the bulkiness of silver and the destructibility of paper in such an instance. And
8. The fact that the money was secreted in a corn crib shows that it was not to satisfy a love of gold, for
 - a. There was no safe place about the house, for
 - (1) There were a number of small children,
 - (2) It would endanger the safety of all. And
 - b. If the love of gold had existed, Swahlin would have provided a se-

cure place in his house or about the place which he could have visited without fear of observation and discovery.

- B. The argument that Nathan Swahlin possessed a motive to murder in the love of money is not only misleading and unsound, but as indicated by his manner of living and surroundings is refuted by evidence of the contrary, for
1. It falsely assumes that the accumulation of money necessarily brings a desire for a higher standard of living, hence the lack of such standard in Nathan Swahlin proves the greed for gold preventing it, but the accumulation of money in many does not create a desire for a higher standard, for
 - a. A standard of living is more a matter of habit, and
 - b. Nathan Swahlin's habits of life had been formed years before. And
 2. Neither does the accumulation of money in most instances cause a love of money, for
 - a. The pleasure of accumulation is more often its own reward, and
 - b. If it did then our wealthy people would all have a passion for money, but they have not. And
 3. The evidence does not show that Mary Swahlin and her husband were living in protest under circumstances different from what they had always been accustomed to. And
 4. The evidence does not show that they were coerced or could have been coerced into accepting such a condition contrary to their wishes. And
 5. The evidence does not show that Mary Swahlin was a woman of refined instincts crushed by Nathan Swahlin, but that she was a woman of low instincts, for
 - a. She was not above the suspicion of theft,

- b. She was the victim of intoxicating drink and not one woman in ten thousand is so depraved. And
 - 6. The evidence does not show that Henry Swahlin was a man of high ideals and ambition enslaved by Nathan Swahlin, but that he was a man of brute instincts, for
 - a. He was not solicitous about his wife,
 - b. He crawled into and slept upon the very bed in which his wife had died not a half dozen hours before. And
 - 7. The evidence shows that Nathan Swahlin did not know at the time that his daughter had gone to the poorhouse. And
 - 8. The evidence does show that of his own accord he went after her immediately upon such information. And
 - 9. The evidence does not show that the daughter and her children were supported in Nathan Swahlin's house to save money rather than to protect the woman and her family from the incapacity of a feeble mind.
- C. Not only is the argument in support of a motive in the form of a love for gold misleading and unsound and refuted by evidence, but Nathan Swahlin had no such motive since he had the opposite motive not to do so, for
- 1. Nathan Swahlin is presumed to have acted rationally and he would have had everything to lose and nothing to gain by such an act. For if he did
 - a. He would shut off all chance of recovering the money.
 - b. He would break up his own home.
 - c. He would render his own son wifeless and his own grandchildren motherless.
 - d. He would defame his own name.
 - e. He would ruin the family name of all who were nearest to him.
 - f. He would burden himself with a criminal conscience.
 - g. He would highly endanger his own life.

h. He would compromise his soul before an unknown eternity. But if he did not

i. He would secure every advantage which such act might afford, namely, future security of his money, for

(1) He could simply replace his money in the bank. And, finally,

j. He could live and die in peace.

Issue II. Again, the contention of the prosecution that Nathan Swahlin had a sufficient opportunity to administer poison is not consistent with the facts, for

A. The existence of an opportunity before Mary Swahlin's first illness has no bearing on the point, for

1. Mary did not die from the results of such an opportunity, for

a. She said many hours afterward "that Swahlin had given her something to make her sick the night before." And

b. Her subsequent household labors are proof of her recovery. And

B. No opportunity to have given her poison could have existed afterward, for

1. Once suspecting the danger she would have refused to take anything from him directly. And

2. She would not have taken anything from the bottles which he had secreted, for

a. They would have been doubly suspicious. And

C. No opportunity existed in the earlier hours of the day of her death, for

1. Nathan Swanson was away to a neighbor's until near eleven o'clock. And

D. No opportunity existed just before the noon hour when the deed must have been done, for

1. No sane man would have chosen such a time, for

a. The family would be called together for the noon meal, rendering aid to the victim, and

b. The crime would be almost certain of discovery.

2. A drug which is heavier than fluid would have settled to the bottom of a flask a long time before this hour.

Issue III. And, finally, the subsequent circumstances prove nothing incriminating against the defendant, but precisely the reverse, for

1. If Mary Swahlin told the truth when she said that Swahlin had given her something to make her sick the night before, then he had no further opportunity to give her poison. And
2. If she told a falsehood when she said this she repeated the falsehood later, for
 - a. She must have felt resentment against Swahlin, for
 - (1) She showed anger at his accusation. And
3. If Nathan Swahlin had poisoned Mary Swahlin he would have shown ordinary prudence in avoiding suspicion through his own indifference or unusual actions, but he did not. And
4. If he had actually poisoned Mary he never would have bidden her good night, for
 - a. The motives prompting the two acts are wholly inconsistent and contradictory. And
5. If Nathan Swahlin had been driven by a guilty mind to change his bed he would have satisfied the feeling, not by going three rods farther away, but by visiting over night. And
6. If Nathan Swahlin had attempted Mary's death he never would have disturbed her when he had reason to suspect her immediate illness to either thwart the plan or to be challenged as to the cause of it. And
7. If Nathan Swahlin had poisoned Mary Swahlin he would himself have suggested suicide as a more plausible theory than whiskey, for whiskey seldom kills people outright.
8. If Nathan Swahlin had poisoned Mary Swahlin and had adopted the whiskey theory as a cloak, he would never have discredited his own theory before the suggestion of another by

saying "that he never would have believed whiskey would have had such an effect," and thus actually to direct their minds to the true cause, but would have emphasized the opposite. And

9. The words "dead drunk" were exactly descriptive of the natural inference of an innocent mind knowing the details of Bertha's whiskey debauch. And
10. If Nathan Swahlin had poisoned Mary Swahlin through the medium of whiskey there would have been some odor on her breath or some alcohol in her body, but there was neither by unanimous testimony. And
11. If Nathan Swahlin had not been innocent of the crime he never would have admitted that the bottles were his and that he knew them because he had marked them, for
 - a. While these facts are perfectly innocent from his explanation from another point of view they become dangerously suggestive. And
12. If Nathan Swahlin had poisoned Mary through the medium of whiskey he never would have sought out the bottles after her death and in the open presence of witnesses; they would have been removed secretly or left for others to discover. And
13. If Nathan Swahlin had not placed the bottles where they were found simply to test the woman's proclivity to steal he never would have used these bottles together to administer one dose nor placed another where the children might have found it. And
14. If Nathan Swahlin had given Mary Swahlin poison she would, without a shadow of a doubt, have given the alarm and sought help when she staggered upon the stairs, for
 - a. She must have already felt its unusual effects.

DIRECT PROOF.

Not only did Nathan Swahlin not have a sufficient motive to commit the act alleged, nor a sufficient opportunity, nor did

the circumstances attending indicate guilt, but both circumstances and testimonial evidence prove that Mary Swahlin committed suicide, for

1. There was a sufficient force impelling her to do so. And
2. She had a sufficient opportunity. And
3. Attendant circumstances corroborate the fact. And
4. Testimonial evidence corroborates the fact.

Issue I. Mary Swahlin had a sufficient force impelling her to commit suicide, for

1. Internal condemnation must have been poignant, for

a. She had become suspected if not an actual thief, for

(1) Nathan Swahlin testified that she had previously stolen.

(2) She was under a cloud of suspicion concerning the disappearance of Swahlin's \$500.

b. She was addicted to alcoholic drink, for

(1) She sent her own husband to town for it.

(2) She joins Nathan Swahlin in procuring and consuming a keg of whiskey shortly before her death.

2. External influences were driving her to destruction, for

a. Her home was a hovel of filth.

b. Her husband was incapable of appreciating her need of better surroundings.

c. Her feeble-minded sister-in-law and children were impounded upon her.

d. The cares and anxieties characteristic of maternity oppressed her.

e. She was harassed by the daily presence of Nathan Swahlin who suspected her.

f. Her neighbors shunned and kept aloof from her.

g. Her surroundings were those of a foreign country.

h. She had reason to think that as long as she lived Nathan Swahlin would never bestow property upon her husband and children.

Issue II. Mary Swahlin had a sufficient opportunity to poison herself, for

1. She was practically alone during the forenoon of the day of her death.
2. There was no evidence that she had not ample opportunity while her husband was gone for the doctor and while he was doing the chores.

Issue III. The attendant circumstances corroborate suicide, for

1. Her own statements reveal such a purpose, for
 - a. She told her husband the day before "that some day she would take a dose which would end all."
 - b. She talked with her husband shortly before about the disposition of the children.
 - c. She talked with and about the placing of her children.
 - d. She talked the day before in a despairing manner "that she did not care where she was buried—a manure pile would be good enough."
 - e. She requested her husband the night before to give some new dishes which had been ordered, but had not arrived, to Tilda, her oldest girl.
 - f. Although it may be argued that her statements at the last were to the contrary, yet these are not convincing, for
 - (1) They were unnaturally brief if she believed them, and
 - (2) They are susceptible of other explanations, for
 - (a) Her request for a doctor proves nothing, for
 - x. It might have been in an extremis of fear characteristic of strychnine poisoning when agony had dispelled her first purpose, or
 - y. The request might have been in a moment of actual repentance as often happens in attempts at suicide, or
 - z. It may have been to remove suspicion from her own act, believing

that a doctor would no longer be of any avail.

(b) Her statements in regard to poison indicate guilt, for

v. She would not have known that she was poisoned at all unless she had herself administered it, for

Swahlin would not have told her so, and She had never experienced the effects before, and

Innocent people are very slow to suspect poisoning where the effects come on gradually.

w. She probably desired to divert attention from her own crime.

x. She may have desired revenge against Swahlin.

y. It was said at a time when the association of ideas in her brain were probably deranged by the effect of poison upon the nerves.

z. Her last declaration was not necessarily, while in the fear of death, nor voluntary, nor indicative of an understanding of the question, being the single word "yes" and in response to a leading suggestion.

2. Her own actions support such a conclusion, for
a. She planned her actions to conceal her purpose, for

- (1) She did the morning work with usual thoroughness.
- (2) She went upstairs to be out of the way of interventions.
- (3) She carefully placed everything upon the table before going upstairs so as not to be compelled to return.
- b. Her actions must have been controlled by a definite purpose, for
 - (1) She absented herself without partaking of food just at the time when naturally she would have been present at the noonday meal.
 - (2) She started downstairs at the call of Swahlin, but returned to complete the deed.
 - (3) She made no outcry for help.
 - (4) She made no struggle to get downstairs.
 - (5) She refrained from explaining matters either from a guilty mind or a lack of mind to realize the need of explanation.
3. The instrumentality employed in administering the poison points inevitably to suicide, for
 - a. She could not have taken the poison in whiskey, for
 - (1) The circumstances indicate that she was drinking heavily or not at all.
 - (2) Not the slightest odor of whiskey was found on her person.
 - (3) Not the slightest trace of whiskey was found in her system.
 - b. She could have taken the poison from a vial, for
 - (1) A bottle containing poison was found in the bed where she lay, and
 - c. Although it may be argued that this fact is suspicious, yet this is not fairly so except upon some untenable presumptions, namely,
 - (1) Except upon the presumption that Swahlin was guilty.

- (2) Except upon the presumption that a person sleeping in a bed must necessarily discover any object, though small, even down to the mattress, when the mind is distracted by a calamity.
- (3) Except upon the presumption that an examination of a bed by throwing back, from one end, the covers diagonally, was perfectly done and would necessarily reveal an object, though small and of the color of the bed, beyond a reasonable doubt to people above the age of middle life and whose eyes were accustomed to the use of spectacles.

Issue IV. Testimonial evidence corroborates that Mary Swahlin committed suicide, for

- 1. The girl, Dora, testified that she saw Mary take a bottle from the cupboard, pour flour from it into a tin, mix in water with a spoon and drink it just before the dinner hour on the day of her death, and although it may be contended that this testimony is weak because made by a child, because not communicated at once, and because talked over between herself and others, yet this is not true, for
 - a. The early age of a child is its best guarantee of truthfulness provided given intelligently and connectedly, and
 - (1) This testimony was given with exceptional clearness and consecutiveness.
 - b. That the child was coached is completely disproved, for
 - a. She told her story most freely to the prosecution—strangers against whom she would have been cautioned and most reluctantly to the defense to whom she would have been familiarized. And
 - b. She used the word “flour” in describing the contents of the bottle, which is an analogy characteristic of the innocence of childhood and no

- schemer, unless a student of childhood; would have conceived such a clever device to cast a proper flavor of truth over it, but rather would have been afraid of such a figure and would have used the word "white." And
- c. The child, while showing great timidity and reticence, yet did not cast one glance toward her supposed coaches for reassurance and help, a thing which a child, if trained, would instinctively have done. And
 - d. The talks with Dora were principally by rather than the defendant, but could not have been alarmed at an array of evidence which they, living at a distance, could not have known nor analyzed. And
 - e. The danger of such a course with such a small child is so apparent that the possible advantages would be more than offset by its riskiness. And
 - f. The simple fact that the child did not immediately disclose her observation is perfectly natural, for
 - (1) It had no particular value or meaning to the child.
 - (2) A child forgets an incident easily.
 - (3) A child does not naturally reflect upon its past experiences.
 - (4) The child did not naturally connect this occurrence with what was sought.
 - (5) Multiplied quizzing only confuses a child and renders it more uncertain.
 - g. The apparent contradiction as to time is of no significance, for
 - (1) A child has no self-consciousness of time.

- (2) A child does not associate events in chronological relations, but by vividness of impressions, their similarities or contrasts, or by a suggestive overlap.
- (3) The child seemed not to be certain of the question. And
- c. If the girl had been coached it would prove nothing, for
 - 1. Nathan Swahlin might still be innocent, for
 - a. Many innocent people have become the victim of unfortunate circumstances.
 - b. Manufactured evidence might help an innocent man out of a calamity as well as a guilty one.

CONCLUSION.

Since the evidence that Nathan Swahlin had a sufficient motive to commit the crime alleged in the indictment has been conclusively refuted by showing that he had a stronger motive not to do so, and

Since the argument that there was a sufficient opportunity for Nathan Swahlin to have administered poison has been shown not to have existed, and

Since the contention of the prosecution that the circumstances attending have shown the defendant guilty have been clearly shown to indicate the exact reverse, and

Since also the defense has proved that Mary Swahlin committed suicide because there was a sufficient force to impel her to do it and because she had an ample opportunity and because the attendant circumstances point inevitably to that end and because by the testimonial evidence of Dora Swahlin the fact is established irrefutably and since by the public declaration of the defendant himself upon the witness stand that he did not commit the crime.

Therefore the prosecution is incapable of producing proof to overcome such an avalanche of evidence beyond a reasonable doubt and Nathan Swahlin stands acquitted of the crime alleged in the indictment charging him with the murder of Mary Swahlin in the first degree.

CHAPTER XXII.

NATURE OF REASONING UPON APPEAL.

Various Forms of Reasoning.

Didactic Reasoning.—In general, reasoning upon appeal is subject to at least two broad but exacting requirements. First, it should be didactic and purely intellectual, and, secondly, it should be expository in style. Mathematical processes exhibit the former quality of argument in perhaps its finest form. But in mathematics the media dealt with has been so purged of life content that the emotional soil has been completely washed out. The proper personal attitude of legal reasoning on appeal is analogous to what is known as the scientific spirit in inquiry, it must be assiduously cultivated. The higher tribunals, and particularly the appeal courts, are constituted in the eye of the law a logical machine, and in no sense a group of heartburning philanthropists. Law is not a program or system of mercy or of vengeance, but of justice, and justice is a pair of scales which weighs out deserts rather than desires. To presume therefore to move such a tribunal by other than logical methods is to impute to it at once a fundamental weakness. And so just as these courts of appeal school themselves are schooled and take oath to exemplify and exercise a purely intellectual and logical function, so too the reasoner on appeal should endeavor to meet with an equally logical poise this high requirement of the bench. And it may be added in this connection that although the emotional element may vary from the basest and most violent passion to the mildest form of sentiment, yet in no form is it here proper and legal; the

argument should be impartial, unbiased, dignified and impersonal.

It follows as a sequence of what has been said concerning the style of appeal reasoning that certain language considerations tend to make or unmake such an effect. For example, figures of speech are often dangerously laden with associated emotional content, and are therefore objectionable, but this does not mean that now and then a figure by way of illustration or analogy may not be entirely unobjectionable. Or again an emotional tone may subtly pervade a paragraph of generalization or a climax or a summation of argument. In fact, an overemphasis of a logical argument in climax may easily engender an emotional pressure. There is no doubt a heat of argument itself and, not uncommonly, it is this reflex excitement which beguiles an otherwise able attorney into attaching too much value and importance to a particular argument. This should be sedulously guarded against.

There is a general rule of composition, oral or written, that scientific discussion should, when addressed to learned hearers or readers, be couched in the phraseology and terminology of that science. This rule applies with special force to legal reasoning because many of the terms employed in legal science have been defined by law and must be held strictly to such content. Since a particular word or phrase has been dedicated to a particular use it is obvious that such language, however technical, is not only the appropriate, but in many instances the only legal expression to use. However, this does not require that obsolete verbiage be piled up, but somewhat in the same spirit as the rule of pleading which prescribes that facts should be plead according to the legal effect. A caution should be here appended to the point that a conclusion of law or legal term of any kind must never be used in an argument where the existence of the object of this very term is in issue. The result it is seen will be the logical error of begging the question. Otherwise legal phrase-

ology is the clearest and most economical of time and words as well as being the most accurate. Closely allied, but in no sense a violation of the preceding consideration, is the question of associated fields of terminology where the trial becomes involved in scientific problems. Thus many trials invade the realms of medical, chemical and physical sciences, economic and social sciences as well as touching on religious and political rights of all kinds. It is in general safe to say that where law has not indicated a preferred usage the proper terminology should be that adopted by the science to which it belongs. And the rule holds that for accuracy and dispatch the technical phraseology is soundest and best for the legal argument. This requirement demands considerable study on the part of the legal advocate, but it is a part of his lot as well as his advantage to be compelled to know many things and so far as he goes to know them well. Of course it remains that a needless flamboyancy of words and high sounding terms where they serve no real purpose is always a matter of disgust to the court and of reproach and disappointment to the offender.

Expository Reasoning.—In the second place, reasoning on appeal should be expository reasoning, namely, it must seek to reach an acceptance of the view presented, not irrespective of the logical processes which may be the case in the usual argument before the general hearer or jury, but on the contrary only because of the steps in the process. In other words, the reasoning here demanded is not merely a logical process, but a logical process which exposes to view and inspection every link, joint and hinge. This expository feature makes the movement at once slower and pervaded throughout with analytical explanations and definition.

The argument, as a whole on appeal, is usually quite as much a criticism as an argument. Its purpose is to discuss and to expose the data in which some error is supposed to lurk and thus to demonstrate the existence of such error.

There may therefore result a series of somewhat apparently disconnected parts, for an appeal in most instances will deal more directly with subissues than with the main issue as defined in the minor premise. It follows from these facts that an important part of the reasoning on appeal consists in setting out propositions which are involved in the meshes of the trial data and which are questionable. Once they have been reduced to the form of propositions the truth or falsity may then be proved or disproved by evidence. Again, it is well to note that such exactitude and amplitude of logical method is not for the purpose of overcoming ignorance or inertia of understanding on the part of the court, but to facilitate their examination of the law as applied under the circumstances. The court on appeal is not concerning itself with the fairness or unfairness of the case, but upon the correctness. If the law has been applied correctly the machinery of the law is responsible for the result. It is not the fault of the court if the proper application of law does not secure commendable results. The reasoning on appeal therefore is engaged wholly with the question of correctness and in no sense with that of justice except of course where the question of prejudice to one or the other party is itself a question of law, and even here it deals with the correctness of the application of the rule.

However, the reasoning applicable to an appellant's case naturally differs somewhat from that of the respondents, for while the one assumes the offensive attitude the other employs defensive tactics, and this difference is a real one in point of method and handling. The opposition to a proposition in order to carry weight with a judicial tribunal must be more than obstruction, more than a clouding of the issue: it must evidence, first of all, a full and complete comprehension of the argument to be answered, and an open, direct and frank exposition of its weakness. Much of the disputation in ordinary life is merely contentious dispute or evasive

clouding or smothering of the argument made in place of a clearcut answer to the same.

Adaptations to the Court.

Assisting the Bench.—Like all forms of reasoning which do not presume ideal conditions and which are compelled to estimate the conditions affecting the receiving mind, reasoning on appeal must adapt itself to the nature of the tribunal addressed. The time at the disposal of the bench, the importance of the case to their minds, and their duty to satisfy every precaution for accuracy, are all conditions to be borne in mind and the argument adjusted to them. In a peculiar way therefore the state demands of the appeal advocate that he facilitate as much as possible consistent with thoroughness the labor of the bench. This end is much enhanced by a system of corroborative references, either to the statement of the case and record of the court in appellant's argument or to both this and appellant's brief in the answer of the respondent. So important is this that by statute or by the rules of the court the practice is made imperative. The reason is obvious. The court takes little or nothing for granted. It is not there to take the word of an attorney, however unimpeachable his word, but to check up from the original source the matter under treatment that the mind of the court may estimate the correctness of the advocate's interpretation. Because of this it is a part of the reasoning to constantly keep the material identified and located with reference to the matter under treatment, that the mind of the court may be kept instructed with reference to the matter legally before it. It is one place at least where digression, logically, psychologically or sociologically is always out of order. It is no place to lament family troubles, excuse personal delinquencies, vent ill feeling, reform the court or stage a comedy.

For these reasons the appeal reasoner is asked to present the check for his baggage before he displays his samples.

The Honor of the Court.—While it is neither wise nor the ethics of the profession to presume upon the human weaknesses of the general audience in argument before a higher court, yet there are some conditions relative to the organization and methods of an appeal court which merit consideration. In the first place, a court inevitably makes a record for itself, and endeavors, when other things are equal, to preserve consistency in its line of decisions. If therefore an argument takes ground in opposition to such record the discussion will do well to display full appreciation of the reasons formerly given. This is courteous as well as logical for it shows the court that the argument proposed has been well thought out and will stimulate the court to a reconsideration of its former grounds. However, an advocate should never blunder into the mistake of needlessly exposing an antithesis between his own ground and precedent where it is but slight or perhaps does not exist at all, but should endeavor at least to harmonize his own point of view with established authority. He should be certain that the principle can not be solved upon common ground before a deadlock is announced, and a court is well within the bounds of logical consistency in moving slowly when opening up established precedent to satisfy the demands of better law and general progress.

Once more a reasoner on appeal should not only be acquainted with the previous decisions of the court, but also when a divided court has revealed the personal views of its members. The particular grounds of dissent when obtainable should be carefully noted, and in this manner the subsequent deliberations of the court may be anticipated and in some degree influenced. Nevertheless mere obiter dicta should never be quoted as an actual decision of law, for it is exasperating to a judge to have his words put in a wrong

light since if not ignorantly used the only inference is that the purpose is to mislead. In opposing a previous decision of the court it is often more salutary to oppose authority with authority and that under the most analogous cases and by the most reputable and superior courts. While a court might feel some hesitancy to admit being outreasoned by a lawyer it would not experience such reluctance in yielding to the learning of an equal or more celebrated tribunal.

Judicial Notice.—The line between too little particularity and too much particularity is a problem for this species of reasoning as well as for others, but solved along slightly different lines. The general reasoner has no right to insist upon a contribution of information from his hearer, he must accept what he finds, but the legal advocate has a right to claim the advantage of judicial notice on the part of the court. However, as to just what the boundaries of judicial notice include is not always a certain matter. The field covered is defined in a definite way concerning statutes, but in a very general way relating to other matter. To what extent therefore may and should this principle be used upon appeal? Note should be taken of the fact that judicial notice as applied to the need of proving a proposition and as applied to the mere existence of a fact are not the same. The court will take judicial notice of many matters during a trial in connection with evidence, thereby making it unnecessary to prove materials which would otherwise consume much needless time. But because no proof is demanded for such facts does not necessarily imply that their existence and bearing upon other facts will be recognized by the court without calling their attention to the same. Judicial notice means judicial acceptance without proof rather than an omniscient taking into account. Therefore as an exemption from the necessity of proof the legal advocate may assume the court's proper attitude toward a given matter without comment, but if it be desired to use such material it stands in the same

category as all other matter, that is, it should be set out fully, for the thing "to be proved" and the thing "to be used" as proof for some other purpose are wholly different.

Once more it should be borne in mind that a further difference exists between judicial notice of a proposition as a fact, as in cases of formulated rules of law in statutes, and judicial notice of the truth or legality of such proposition. It does not follow because the court is assumed to know the existence of a given statute, that in cases where the statute is attacked on account of its illegality the court may be presumed to take judicial notice of its constitutionality. Judicial notice could not well be identified as a bar to questions at issue.

The Historical Phase.—A large measure of appeal reasoning naturally relates to questions of law just as on the contrary the major portion of argument before a jury deals with matters of fact. The weighing of evidence in the two fields is always an important factor in the problem and often rises in importance to a special phase of the process; but weighing matters of fact and law are vastly different. The former seeks to measure the value through a subjective standard of impression in the minds of the jury, while the latter seeks to measure the value through an objective standard of usage and authority. To do the second introduces an historical question. The argument from authority of a primary nature is not comparative in its character when the question of law is referred to statutes or constitutions except in those instances where particular statutes are undergoing a process of interpretation and enlargement of scope, such as those referring to commerce, etc., but when the law is expressed almost wholly in a line of precedents the nature of the comparative value of decisions is of paramount significance. Appeal reasoning therefore takes on a somewhat narrative character where it traces the evolution of a principle through a series of applications in order to show its strength

and authority. One case in this way may be shown to express better law than a score of other cases having no such an historical recognition. Thus the process of disclosing the ranking value of a decision becomes quite as much a form of the argument as does the reference itself. Courts as a rule in justification of their own rulings prefer to base their decisions upon a line of precedents which they frequently set out with great learning and fullness in the reports.

An observance of the preceding considerations involves the question of associated forms of terminology where a trial raises scientific problems. Thus, as has previously been stated, many trials invade the realms of medical science, chemical and physical sciences, economic and social science as well as touch upon religious and political rights of all kinds which in turn have had an historical evolution. In general, it is safe to say that where law has not indicated a preferred usage the proper terminology should be that adopted by the science to which the question belongs and the further rule obtains that for accuracy, the technical phraseology and meaning which was in vogue when the term was used should be recognized. This requirement again demands a considerable study on the part of the legal advocate of past and sometimes remote conditions.

The Oral Supplement.—Not all reasoning on appeal is written, for there usually is a supplementary oral argument. In this case the advocate needs a special preparation which will be adaptable to considerable condensation. The amount of time allowed for a given discussion is within the discretion of the court, and not only may this be much more limited than anticipated, but may be suddenly shortened during the very argument itself. The court rightly considers the argument to be for its own purpose only and feels entirely within its power and jurisdiction to interrupt, propose questions, make comments or shorten or even abruptly terminate the argument. As a result an attorney unprepared for such

an emergency may suffer from mental confusion and be unable to extricate himself or reconstruct his plans so as to be in any sense effective. All this should be anticipated and the argument be so well apprehended as to parts and values that the matter may upon short notice be curtailed where the loss will be least felt. However obvious it may seem, it is well to remember that the cutting process should begin upon cumulative material, for this does not touch the structure of the argument. It is likely to prove disastrous to omit any intermediate step in an argument which is deductive in its nature, but on the contrary an induction or an argument from antecedent probability or sign may be cut down. Then again in the examination of cases to expose the lack of analogy or false interpretation it is often possible to read less or quote less or examine a less number of features without sacrificing more than the quality of exhaustiveness.

What has been said of such rebuttal process may apply also to the positive proof by such methods. Generally speaking, much time may be saved by extra care in the setting out of the idea to be supported or negated. A distinction clearly thrown out by contrast and in contrast so that it differentiates from the thing next to it in meaning and expression is conspicuous, and is then quickly handled. It is confusion and indistinctness which calls for more and still more explanation and elaboration. Again time is also lost as well as cogency of effect by referring to books and papers and notes when the facts should have been present in the speaker's mind. This is often the fault of an indolent mind, but safety comes only through systematic preparation.

CHAPTER XXIII.

THE NATURE OF THE APPEAL BRIEF.

Formal Requisites Generally.

Although the filing of a brief is now required as a matter of statute or of court procedure in practically all of the appellate courts of this country, yet the precise form of the brief is not so specifically prescribed. A definite idea of what it should contain, however, may be ascertained from its purpose, which is, first of all, to assist the appellate court in reaching a correct decision. Beyond this it circumscribes the limits to the oral discussion, if there be any, and in a subsidiary way gives information to the opposing counsel. From these points of view what it should contain may be fully estimated, but as to how it should be drawn up, an equally important phase, no absolute plan has so far been adopted, although the practice of the United States Supreme Court offers some valuable suggestions. Outside of the question of printing, typographical details, number of copies, etc., which local statutes usually regulate, Rule 21 of the Supreme Court of the United States requires the following order of arrangement: 1. The Title of the Case; 2. A Preliminary Statement; 3. Abstract Statement of the Case; 4. Specification of Errors, and 5. The Argument. It is obvious that the first four of these topic heads are of an introductory character and could well be put under the head of Introduction. However it is not usual to so specifically entitle them.

Introductory Page.—Naturally, the brief requires a proper title, and since the brief upon appeal may serve any one of three functions, to voice the appellant's cause, the respondent's answer, or the appellant's reply, it should state at the

opening which one of these documents it purports to be. Immediately above this should appear the name of the court to which the brief is addressed and the term of court therein. Following this the names of all the parties to the cause should be given respectively under the terms, plaintiff and defendant connected by hyphen with the additional description, appellant, appellee or petitioner, according to the usage of the court and jurisdiction. It is customary also to affix to the title the calendar number assigned to the case, the name of the court from which appealed, the name of the judge and the engaged counsel.

Statement.—Next in order there should be prefixed a record of the legal origin and developmental steps which have brought the case before the appellate tribunal. Whether required by the court or not, such a preliminary is essential to give a brief epitome and general background for the more specialized exposition which will take up certain steps or phases of such process. This statement is to place the argument within its general setting. To do this ought not to require more than a short paragraph or two stating who brings the appeal, from an incident of what court, in an action seeking what relief and met by what defense, with a result of what nature and how the cause was brought into the higher court. Of course if the brief be one in answer or reply the same completeness is not necessary where the reference to the appellant's original brief is clear.

Abstract of Record and Statement of Fact.—It is essential next that the legal problem presented to the court for solution be fully set out. Some states require a separate pamphlet for an abstract of the record. This demands whatever portion of the case is relevant and necessary to the proper adjudication to be abstracted from the record in a succinct and comprehensive way as data for the consideration of the court. It may involve merely questions of law or issues of law based upon the nature and kind of evidence

so that the most judicious care and skill must be exercised by counsel in selecting no more and no less than what is needed as well as in perceiving clearly what is crucial to the appeal. The appeal may cover a wide range of error, and so important is this part of the brief that a case may be sometimes practically won through the self-evident quality of the statement prefixed. Self-evidence is a product of masterly presentation. Facts as a usual thing are dumb and must be made to talk. Therefore the selection of materials and especially their order and form in this connection is one of the most difficult features of the brief. From the point of view of conduct the error may be either one relating to the judge upon questions of rulings, orders or irregularities or one relating to the jury upon questions of regularity. On the other hand, from the point of view of materials it may relate to process, to the pleadings, to the facts, to the evidence, to the argument of counsel, to the instructions, to the jury or to any irregularities of procedure vital to the issues or contrary to law.

Since the function of this part of the brief is to furnish the court with a basis of "facts given" upon which to arrive at a lawful decision, it is evident that the first prerequisite to this "statement of fact" is, absolute honesty and accuracy. The two qualities are not identical. Accuracy is merely the correctness of the data presented, but honesty demands that all of such data be given which materially affects the question or questions raised. The second is equally as important as the first. Delinquency in regard to the former is an unpardonable offense since it is a purely clerical part of the work, but the latter calling for an exercise of judgment is a more delicate problem. However, the advocate is presumed to possess the legal training sufficient to enable him to satisfy this requisite under usual conditions. Unless counsel object, the facts presented as those "given" are presumed by the court to be both accurate and complete.

Courts are under no legal constraint to question these data upon their own initiative nor to investigate further for themselves nor to call for more light, but may render their opinion upon the abstract and statement given. Not infrequently for moral reasons, however, they may criticise the delinquency of the brief or refuse to consider it altogether.

The variation in the composite of material which may come up in different cases under the head of appealable error is so great that no outline of an exact order which would prove uniformly serviceable is possible. Naturally the order in which the material was developed during the trial suggests a possible order, but this may not be always workable nor even logical. Generally each issue raised will constitute a nucleus of unity around which a group of material may be organized and the issues, if they be of more than one species, may be treated in separate bodies according to their class, that is, all errors arising out of the pleadings may be grouped together, all relating to evidence together, etc. And yet, simple as such an arrangement may be, a more intrinsically logical connection should not without careful consideration be sacrificed to a merely formal grouping. It is likely that the arrangement within the topic or group will prove of the most importance and require the most skill. In this relation one general consideration should be realized as paramount, to wit, all material should be so ordered that its exact bearing and relation to other parts is at once obvious and unmistakable. The relationships are the things which reveal to the court the correct inferences to be drawn from the situation. Like a problem in geometry all bearings must be comprehended simultaneously and at all stages in the argument to be later developed. If these conditions be sought and be maintained in the arrangement of the materials into a statement the result can hardly fail to be one of clarity and effectiveness.

As has already been pointed out, the argument and brief

upon appeal must be both corroborative and subject to corroboration. The advocate's contentions are based and limited upon the court record. The facts are "given" and they are upon record and can neither be modified nor garbled by the briefmaker, and when the appellant's brief is filed it is also "given data" and a further basis and limitation upon the respondent's answer, while this in turn becomes "given data" to be respected in the appellant's reply. Now the briefmaker is not compelled to quote "verbatim" from the "given data" unless because of its importance or brevity it is wise or convenient to do so, for the result would be unnecessarily to incumber the brief and destroy its very purpose, but it is sufficient and proper to give what the advocate understands to be the substance of the material. Evidence therefore is not required, but merely the facts which the evidence embodies unless the evidence or material itself be in issue. Safety in this method, however, can only be assured when the proper corroborative references are made. Material in "the statement" should therefore always refer to the precise place in the record, case or brief from which it is abstracted and where the original data may be found. This calls for an appropriate system of numbering pages, sections, lines, etc., which is usually prescribed by statute or rules of the court. Violations of these requisites are always condemned, but the penalties inflicted vary with the different jurisdictions from a warning, reprimand or disallowance of expenses to a prompt affirmance of the judgment or a dismissal of the case.

Obviously the "abstract and statement" in some jurisdictions separated become the immediate data upon which the argument to follow is in turn based and to which it may frequently be convenient or necessary to refer in the course of the discussion. Here again there is a corroborative system and therefore the materials of the abstract must be so definitely numbered that a reference made thereto will be

precise and unerring, for the court has not the time to search for the point referred to. An index to this abstract, if long, is therefore valuable.

Preliminary Statement.—While the "abstract statement of the case" usually contains all of the material necessary to the adjudication of the case, nevertheless now and then there may arise a demand for another statement of fact outside of the records, but which is nevertheless pertinent to the case. Where the litigation has been the outcome of an historical evolution or development this may occur, and hence matters relating to the nature, origin and occasion of the dispute may be highly important. Such matter must of course be undisputed and admitted data of which the court may properly take judicial notice.

Specification of Errors.—The next division of the brief and the one immediately preceding the argument is provided for the specification of errors. It is plain that this amounts to a statement of the issues which in an argument upon appeal consists in errors of the preceding trial. The courts are agreed that nothing is more fundamental to a good brief than an adequate setting out of the errors relied upon for a reversal of the decision and they have unsparingly criticised the violation of this requirement. The advocate may fail at this point in a number of ways. Sometimes no errors have been specifically pointed out either preliminary to the argument or even within the argument itself. Thus in a well considered case the court says: "Neither in its proper place nor elsewhere in the brief is there set out, in accordance with the command of the rule a specification of errors relied upon. Here and there in the argument may be gleaned the reasons urged for reversal; but the rule requires that the errors specified must be grouped together, and must constitute a division of the brief separate and distinct from the abstract and from the argument." And again, it adds "that the error intended to be urged must be particularly specified,

and, without the proper specification, the appellant is in no position to demand that any supposed error be considered.”¹

Or, again, the briefmaker may fail in the manner of the specification itself. The specification may amount to nothing more than an allegation that error exists and in no sense points out in what way it exists or in what precise details it exists or neglects to quote the exact material which constitutes the error. The court can not rely merely upon the dogmatic assertion either that an error exists or that the substance of the material in error is this or that, but must have the infected part quoted for first hand inspection. In this connection Rule 21, sec. 2, subdiv. 2, of the Supreme Court of the United States, specifies as follows: “A specification of the errors relied upon which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master the specification shall state the exception to the report and the action of the court upon it.”

Or yet counsel, however erroneously, may infer that the court record is the best authority for the errors made, and hence refer the court thereto in place of setting them out in the brief. Such a blunder, of course, suggests that the lawyer's time is more valuable than that of the court and presumes that the burden in such a case is upon the court to investigate for itself the facts upon the record. In one case

¹ *Rehberg v. Greiser*, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41.

the court in discussing this point said: "Counsel for plaintiff in error content themselves with a somewhat lengthy and desultory argument upon certain branches of insurance law, and then say: 'The other errors referred to appear seriatim upon the record, at pages 1, 5, 6, 7, and 137. A reference to the record we think a sufficient presentation of these various assignments, to which we ask the attention of the court without further argument.' The rule of practice in this court is a very simple one. It requires of a litigant who brings a judgment of a district court here for review on error to specifically state in his petition in error of what action or omission of the district court he complains; and the brief filed should, in addition to a concise statement of the facts of the case, under appropriate headings, allege what particular thing the district court did, or refused to do, which the litigant claims was erroneous; and collated under such headings, the litigant should state such arguments and cite such authorities as he deems sustain his contentions. Every judgment brought to this court for review comes surrounded with the presumption of correctness. It is not the duty of this court to search through a record for the purpose of ascertaining if it can find something which the court below did, or omitted to do, which is error; but the burden is upon the party complaining of the action of the nisi prius court to specifically point out the alleged act complained of, and show that it was probably prejudicially erroneous. Only the actions or omissions of the district court which are so specifically assigned, both in the petition in error and in the brief filed here, can be considered."²

Or again counsel either through lack of discrimination or an attempt to make a strong showing or for fear of not covering the ground adequately oftentimes perniciously restate

² *Aetna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. 125. See also *Cleveland, &c. R. Co. v. Bowen*, 179 Ind. 142, 100 N. E. 465; *Griffith v. Felts*, 52 Ind. App. 268, 88 N. E. 432.

the same error under a varied assortment of phraseology and under the guise of distinct errors.

This part of the brief has been likened in function to the assignment of errors in the writ of error employed in the common-law practice, and so far as it defines the exact issue to be reviewed serves the same end, but the latter was also in the nature of a pleading and was jurisdictional, being followed by a joinder in error which brought the specification to issue. Both constitute a selective process, for upon appeal it may occur that not all of the exceptions made upon the record will be utilized as grounds for reversal since some upon the examination of authorities may prove indefensible and others so doubtful or unimportant or weak that it is advisable to abandon them, hence it is necessary to make a definite statement of just what is relied upon, while upon a writ of error a similar elimination of undesirable objections may be made in the assignments of error.

The rule therefore is that only those which are specifically set out will be considered by the court, for if they be not contained within the brief they will be presumed to have been abandoned. Even when an error appearing upon the record or upon assignment but omitted in the brief has been introduced in the oral argument the same has been held prejudicial to the respondent and only allowable in case the latter waive his objection to the irregularity. However, lack of jurisdiction in the lower court is a notable exception to the rule and will be considered whether or not it appear within the specifications of the brief. Said Chief Justice Waite: "No error has been assigned on this ruling, and it was not referred to in the argument here. We do not, however, feel at liberty to pass it by unnoticed. Counsel may, if they desire to do so, file printed arguments on that question, together with copies of the statutes, the consideration of

which is involved."³ On the other hand, the same judge in another case said: "The brief contains no specification of errors such as is required by the rule, and there is no statement of the case presenting the questions involved, or the manner in which they are raised. In the argument there is no reference to the pages of the record relied on to support the points which are made. Not only is there a failure to quote the full substance of the evidence admitted or rejected, of which complaint is made, but even the names of the several witnesses upon whose testimony the objections rest are not mentioned. In short, to get at the matter which is complained of, we must hunt through what is called a 'proposed statement on appeal and motion for a new trial,' filling thirty pages of the record, with nothing in the brief to aid us in the search. This we are unwilling to do. In the present crowded state of our docket we must insist on a reasonable compliance with the rules which have been adopted to facilitate the investigation of cases and help us in our work. We therefore dismiss the case under section 5 of Rule 21 (Supreme Court) for want of an assignment of errors and of a brief such as is required by the rule."⁴

Finally the errors should be set out separately and numbered separately. Each should first be reduced to a single positive statement and not be in the nature of a complex descriptive paragraph. It should have a definite subject about which is affirmed a definite predicate. Such subject may be constituted of quoted material or not, depending upon the nature of the error, and the predicate also may contain quoted matter. When necessary, quoted material should be subjoined immediately below the main proposition to explain its terms. This, however, should not be argumentative, but expository merely of the substance of the

³ *Pennsylvania R. Co. v. St. Louis, A. &c. R. Co.*, 116 U. S. 472, 29 L. ed. 696.

⁴ *Benites v. Hampton*, 123 U. S. 519, 31 L. ed. 260.

record. All argument in support of the contention should be reserved for the part of the brief immediately to follow. The order of succession in the statements of error should be the same as the order of discussion in the argument to come. This must be determined by the logical relation which they bear one to another those which lay a basis for others as a matter of course preceding.

Points and Authorities.—Some states require that an outline be inserted before the argument proper giving the points of argument relied upon, together with the citations of authorities under each. This is an excellent plan. Such points should be worded, numbered and given the exact order to be followed in the argument itself. It is a table of contents.

Argument.

However excellently the preceding headings of the brief have been drawn, they serve nothing more than a preparation of the court for a proper and expeditious understanding of the reasons why the advocate maintains that the decision of the lower court is founded upon error. It is the argument presented by counsel to sustain his objections that is designed to be of assistance to the tribunal of review. It is not references and citations of authorities from which the court may discover reasons which this part of the brief should set forth, but this, the argument proper, should offer the counsel's contentions supported by authority. There is a vast difference between a category of authority from which reasons might be deduced or within which they might be found and a statement of reasons backed up by authority from which they are found. The latter is the proper function and method of the argument and body of the brief.

Obviously, it will follow that each specification of error will constitute a distinct unit of argument. There may be a number of errors, any one of which if sustained will be

sufficient to reverse the decision, but the advocate may not feel secure in relying upon any one, and hence usually presents as many strong ones as possible in the hope that while some may fail one or more will succeed. These therefore being theoretically equal in their possibility of winning the case should be treated as co-ordinate and distinct bodies of argument. Therefore there will be as many general headings in this part of the brief as there are specifications of error and the number of these headings should be identical with those employed under the specification of errors, unless these errors are reduced carefully to more comprehensive issues fewer in number or subordinate issues greater in number, but such deductions must be made so clearly that no doubt may exist as to the results thereby obtained. Reduction of errors into issues should be simple, brief and obviously conclusive.

However, each specification of error must be supported by reasons and each reason will therefore become a point to be substantiated by legal authority. Thus the unit of argument will be differentiated into a main proposition and the subordinate propositions as reasons therefor appended to each of which will be the citation of authority. Of course a reason for the main proposition may in some instances be based upon further reasons and theoretically continue in such a chain of inferences *ad litem*, the last reasons being founded upon legal authority. For the reasoner must remember that until the chain of inference is finally established in the bed-rock of statutes or decisions it is not proved to be law. Hence the logical order demands the affirmation of error first, the reasons next and the authorities last. Moreover the reasons should be based in turn upon still other and more specific grounds until the reasons finally reached are of such a definite and precise nature that the authorities cited may be in their *ratio decidendi* founded upon that particular issue or principle. General reasons supported by cases of a

more limited and specific bearing are always more or less uncertain, vague and unconvincing.

A. The Formulation of a Reason.—A reason should always be stated in the form of a proposition, for principles of law are at root propositions, and so also inferences are propositions, and all argument must be carried on in terms of propositions. Words and phrases in themselves express no relation as a truth either affirming or denying validity. Everything to be proved and every proof in support must be reduced to the subject-predicate combination.

(1) **CROWDED HEADING.**—But even more than the foregoing, a good brief must avoid overcrowded and compounded assertions, especially when it expresses headings to be proved. The objection is that an overcrowded heading is indefinite. It is more like a loosely constructed paragraph, logically considered, worked together into an ingeniously connected phraseology which leaves the mind in doubt as to just what is the real idea which is being asserted. Without much difficulty it may be separated into several different propositions. Naturally with such a medley of qualifications and combination there may result a confusion of proofs adduced in support, some bearing upon one phase and others upon another. All such complexity must be studiously avoided. As an example of this fault in briefing may be cited the tendency to allege and prove without proper separation both the existence of a rule and the nonexistence of a particular exception. Now the two things are perfectly distinct issues and proof of one is not necessarily proof of the other, hence when they are proposed together 'it is not clear as to which issue the evidence belongs. Thus under a specification of error that the court erred in sustaining the demurrer to plaintiff's amended petition appeared the following: (I) "The defense of the statute of limitations must be specially pleaded and can not be availed of by demurrer, in an action at law, even though it appears on the

face of the petition that the limitation prescribed by the statute has expired."

The above is a good illustration of a crowded heading. There are at least three separate propositions compounded aside from a doubtful modifier. It is not certain from the wording whether the phrase (in an action at law) is intended to qualify the first proposition that "the defense of the statute of limitations must be specially pleaded," or merely the second "the defense of the statute of limitations can not be availed of by demurrer." Moreover, while it may be inferred perhaps that if the remedy of demurrer is not available then the statute must be pleaded because the two are alternates, such an inference is neither obvious nor to be accepted without proof, hence presupposes what is to be used, which should be demonstrated. But in addition to this a main proposition should never contain inferences and argument within its own statement or the vicious error of begging the question will ensue. However, the two propositions are not co-ordinate, but the one is a reason for the other and should have been combined in the brief as follows:

A. The defense of the statute of limitations can not be availed of by demurrer, because

1. It must have been specifically pleaded.

(2) COMMINGLING EVIDENCE.—A still more serious fault is that of commingling the above clearcut issue of whether a particular rule of law exists with an issue of whether an exception to the rule does not exist when "it appears on the face of the petition that the limitation prescribed by the statute has expired". Now it could hardly be expected that the evidence which supported the rule would equally well serve to prove that no exception exists. Yet this is what the form of the heading assumes and what the proofs which follow are logically tabulated to do. As a matter of fact the second issue is a negative one and should be handled as

refutation. In place of being where it is it should have been introduced succeeding the first issue as follows:

"And although it may be contended that an exception to this rule exists when it appears on the face of the petition that the limitation prescribed by the statute has expired; yet this is not true, for", etc.

B. Order of Reasons.—Again the reasons set forth in proof of the error may be worded in terms of legal effect upon the facts or in terms of the legal principles themselves. Usually the former is clearer, for with the legal effects stated as matters of fact, backed up by expressions of the law itself in the authorities cited, both phases appear in expressed form in the brief. With the latter method the court is left to infer the legal effect. Both the heading as quoted above, as well as the following taken from the same brief, illustrate the difference. Thus the reason as stated is expressive of a legal rule, to wit:

"(II). When an amendment does not set up a new cause of action, or bring in any new parties, the running of the statute of limitations is arrested at the date of filing the original petition."

Stated in terms of the true legal effect of this rule it would have been (II), the statute of limitations was arrested at the date of filing the original pleading. The authorities in support of this effect should then express the law upon the point. In short, legal effects should precede legal principles so that the intended application of the principle can not be mistaken.

Such a method will avoid the possibility of counsel having one effect in mind and the court recognizing no such an effect striving to discern what possible effect the principle may have. If warned in advance how the law is to be used they are at once in a position to criticise its application. However this does not imply that it may not be well to see that the cases or statutes employed set out the

principles of law fully. The court will usually be able to grasp the principle of law in the authorities cited and its application quicker and easier than to apprehend what the counsel believes to be its correct application to the facts of the case in hand. They are more familiar with legal principles than with the particular facts in the case. This is in no sense a contradiction of what has been said before, namely, that reasons should precede authorities, but it adds further that the reasons should be stated first in terms of their legal effect and, if necessary, in terms of legal principles afterward. The caution first given was against alleging an error to exist and thereupon citing authorities without either a statement of reasons in terms of legal effect or of legal principles.

C. Double Expressions.—Still another source of confusion in briefing the argument is occasioned by mistaking a double expression for two separate and distinct points, and thus apparently proposing two distinct reasons, when in reality there is but one reason constituted of the relation between the two propositions. The opportunity to make this mistake occurs frequently because it is always latent in an argument by deduction where a general rule is cited as a reason and the particular instance is also cited as coming under the rule. Now the fact is that the rule would be no reason if the second were not true, nor would the latter be a reason without an assumption of the former. It is the union of the general statement and the particular instance which together form a single reason. Many times but one of the two is stated, the supplementary other half being implied, but when they are both expressed and at the same time separated by considerable material and numbered as independent reasons they are very likely to pass as independent evidence. The delusion is all the more enhanced by the fact that in many instances both propositions must be proved by distinct bodies of evidence. Yet it does not follow that they

are themselves distinct and separate reasons because they must in turn be supported by distinct and separate evidence.

The above fallacy is also well illustrated in a portion of the brief already referred to. Under numeral II, as the second reason why the court erred in sustaining the demurrer to plaintiff's amended petition, we quote the following: because,

"II. When an amendment does not set up a new cause of action or bring in any new parties, the running of the statute of limitations is arrested at the date of filing the original pleading."

Immediately below this heading and apparently intended as reasons in support thereof we find three propositions, to wit:

"(A) An appellate court has power in its discretion to direct the trial court to allow an amendment to a declaration."

(Explanatory and supporting citations of authority.)

"(B) An appellate court will, in a meritorious case, allow an amendment to the declaration for the express purpose of saving the cause of action from the bar of the statute of limitations."

(Explanations and citations of authority in support.)

"(C) The amendment introduced no new cause of action, hence it relates back to the time of filing the original petition and the running of the statute of limitations was arrested at that date."

(Explanations and citations of authority in support.)

Now it is evident that the main heading marked (II) is the statement of a rule of law in proof and as a reason for the contention that the court erred in sustaining the demurrer, but it is also evident that subordinate proposition marked (C) is merely a supplementary adjunct to the head-

ing (II) and without which it has no validity. Not only must the rule cited be true in itself, but to be a reason in the case it must fit and apply to the particular facts. Subdivision (C) thus merely shows that the facts of the case come within the rule, but this is neither a reason to prove that the rule is true nor a reason standing alone to prove that the court erred. However, in this brief its wide separation from its complement and its marking as subordinate in place of co-ordinate with (II) as well as co-ordinate with (B), which is a genuine reason in support of (II), leaves the reader to believe that it is intended as an independent reason, which it is not; that it is a reason in support of (II) which it alone is not; and that it is a co-ordinate reason with (B) which it is not. It should have been briefed as follows:

The court erred in sustaining the demurrer to plaintiff's amended petition, because

1. (First reason), and
2. When an amendment does not set up a new cause of action or bring in any new parties the running of the statute of limitations is arrested at the date of filing the original pleading, and the amendment introduced no new cause of action, which propositions are true because as proof of the first.
 - (a) Authority,
 - (b) Authority,and as proof of the second,
 - (a) Authority.

D. Expository Headings.—Another cardinal feature of good briefing is that headings which are a part of the general argument should never be made a repository for explanatory or disconnected material—marked headings should be reserved for the statement of issues and reasons alone. That portion of the brief quoted above contained under reason marked (II), with subordinate headings marked respectively

(A), (B), (C), exemplify this error. Under marking (A) co-ordinated with (B), which is a genuine reason for heading (II), we find the statement that: "An appellate court has power, in its discretion, to direct the trial court to allow an amendment to the declaration." So far as form and position in the brief scheme is concerned, this allegation appears as if intended to be a reason, but immediately it is stated to be merely an inquiry into the power of the court for precautionary purposes. After some authority is cited upon the query and some loose argumentative discussion indulged in the comment is made that after all "it is not vital to the case at bar, because the trial court allowed the plaintiff to file his amended petition, but it is discussed here, in case it should be contended by the appellee, that the trial court was not bound to allow the amendment to be made and could have dismissed the case without allowing the amendment on the ground that it was barred by the statute of limitations."

It is to be observed that the error is not that such a precaution was unwise or immaterial, but that the matter is not logically briefed, since it is admitted not to be a reason and merely in anticipation of something which might be contended. In reality it is anticipated refutation, should have been introduced as such to distinguish it from positive argument, and in this instance should have been introduced under heading (B), which furnishes the occasion for such an adverse contention, and immediately following the authorities cited in positive support of (B). The position which it occupies is thus faulty for three reasons: (1) It poses as a reason directly supporting (II), which it is not; (2) It gives no clue as to its real nature or place in the argument; and (3) It is not briefed as refutation and in connection with the point out of which it springs.

E. Fusing Evidence.—Again it is a principle of good briefing not to introduce argument in the form of a running

essay style and merge a number of reasons in the same paragraph without at least having first set them out in proposition form with appropriate numbering or lettering. This imperfection appears under heading (III). The statute of limitations is suspended during the pendency of an appeal. In support of this proposition there are at least three grounds alleged, none of which are set out or numbered in distinction from the reasoning employed to justify each, although several distinct subordinate and important points are made. Had this material been briefed in place of loosely argued the form would have been approximately as follows: Because

III. The statute of limitations was suspended during the pendency of the appeal, since

(1) The statute of many states provide for the arrest of the statute, for

(a) States, and since

(2) The supreme court decisions of various states have established a rule, for

(a) Cases, and since

(3) It is based on a rule of the soundest reason, for

(a) Otherwise it would inconsistently bar the statute during the trial, only to allow it to run during an appeal upon the same issue, and

(b) Otherwise it would annul the decision upon appeal to correct an error of the lower court, and undo its own work and make the lower court final in its decision.

We have already pointed out that in briefing issues of law with which the appeal brief particularly deals the logical order is to set out legal effects, rules of law or usages of the court and statutes or decisions as final authority in the order named. This proceeds from fact through rule to authority and constitutes the process of applying law to the facts of

the case. It is needless to add that the statement of legal effect should be most carefully worded and in terms of legal phraseology when such is established. The second is much more difficult to successfully brief since reasons, whether they are rules of law or practice of the courts or general principles of jurisprudence or public policy, may involve any of the various forms of reasoning in order to body them forth. Thus it may be deduction, induction, analogy, example, elimination, alternates, from antecedent probability, from sign, a fortiori, or indeed any other species of reasoning which is called for.

F. Specialized Forms.—The briefmaker should therefore understand that a particular method of briefing each particular form which the argument may assume, is absolutely necessary in order to make the reason stand out with all the force which is inherent in that particular species of argument. The proper form for these various species of inference has already been illustrated under the sample of logical method of jury brief and hence needs no repetition here. There is no objection of course in supplementing the form when it appears too condensed or formal with a more general running discussion in order to emphasize or call especial attention to any of its features. This is often done to good advantage, but the scientific method of first setting out the machinery of the method of the reasoning should never be wholly omitted. The so-called brief in such case becomes at once merely an argumentative discourse and not a brief in the exact sense of that term.

G. Order of Authority.—The citation of authority is final in the argument: Law is the last recourse in legal controversy. But there is a distinction which has elsewhere been pointed out between "law" and "the law".⁵ There is also a distinction between persuasive authority and supreme au-

⁵ Ante p. 225.

thority. These must never be overlooked by the briefmaker. Let us consider for a moment these distinctions.

"The law" is law which is supremely binding upon the settlement of a particular issue. It is the law of the jurisdiction in contradistinction to the law of other jurisdictions. It is the law as last interpreted by the highest tribunals of the jurisdiction rather than previous interpretations. It is the constitution of the state rather than a conflicting statute or ordinance. It is the last statute or amendment to a statute rather than the previous legislation. When none of these cover the issue it is the best expression of the common law, as found in the best adjudicated cases by the highest legal tribunals of the land. "Law", on the other hand, is merely the consensus of the best authorities formulated into general rules which find expression in encyclopedias, treatises and textbooks upon the subject. These are valuable guides to an understanding of the content and substances of law, but "the law" is the substance of law embodied in the form imposed by some legislative body or court having authority to combine the form and substance together. Out of this distinction springs the second difference of persuasion versus supreme authority. Where the supreme authority is in doubt through ambiguity or contradiction, or can not be found in this day of multitudinous decisions and legal literature, then persuasive authority may be invoked. For cases before the court must be settled one way or another upon well established grounds if such exist or less certain grounds, always upon the former if possible, but upon the latter if necessary.

In the setting out of constitutional and statutory provisions they should be quoted with adequate fullness, and this requires not only the exact words of the section touching directly upon the point, but such other provisions preceding which have furnished a basis for the precise provision as well as any later provisions which have a bearing upon the same point. In short, a developmental sequence must some-

times be shown, and therefore considerable skill may be required as well as information concerning the history of the legislation to combine what is necessary to give a complete yet sufficiently condensed epitome of the law within the space consistent with the importance of the question and the limitations of a brief. Besides the text of the law itself a commentary of interpretation by the courts upon the provisions as found in the adjudicated cases is just as important as the law itself. Not infrequently the interpretations of other jurisdictions upon similar laws or the law upon which the particular statute may have been suggested or taken is cited with powerful persuasive effect. The proper briefing of statutory or constitutional authority thus often becomes a difficult matter. The citation should never fail to sufficiently locate where the quotation is to be found in the original document and counsel should always consult the document itself and never depend upon second-hand quotation from other sources. The brief should be full enough to be self-explanatory and not be a table of blind references for the court to investigate. The court may not relish an unavoidably long brief, but it will prefer this to a short brief with an unavoidably long investigation of external references in order to make it comprehensible.

(1) CASE CITATION.—Inevitably the foundation of a brief rests upon cited cases. And hence it is highly important that these be well briefed. The decision, however, must not merely be referred to, but must be made to work. The value of case citation does not rest upon number or quantity, but upon quality, yet the value of a particular case does not rest upon its value as a quality within itself, but only in its applicability to the point in hand.⁶ A very distinguished and valuable case upon one logical principle may be next to worthless if it is not apropos to the exact question in issue. The following method is advisable. Use cases only which

⁶ Elliott's App. Proc. § 447.

are directly in point, and the most extensively cited cases which can be found within the jurisdiction, but if none exist then the most commanding cases from jurisdictions having similar codes or statutes. Cases should be secured in which the point in question is not complicated with other questions which have been well reasoned, have a clearly expressed opinion and in which the judges have reached a unanimous decision all from the same reasons. If the case involves material which appears to weaken the decision there should be explanations when possible that the difference is more apparent than real. Nor should the opposition ever be allowed to anticipate one in pointing out a conflicting element, but all opportunity should be removed for such an attack. If the disturbing element can not be successfully explained the case should be discarded as positive authority, but if it be strong enough to be cited in opposition it should be made a part of the anticipated refutation. However it is never well to anticipate an opponent's cases unless it is morally certain that they will be cited by the opposition. It is best to make much capital out of a few excellent cases and destroy the opponent's strength by utterly refuting the one or two citations which are the bulwark of the opposite view. No attempt should ever be made to refute in advance the whole field of the adversary's citations. One or two should be centered upon and made representative of all that can be said in opposition. To do otherwise will burden the brief, disclose too much of the enemy's resources, disclose distrust in one's own position and invite retaliation and defense which might not otherwise have been proposed.

The most decisive cases should be quoted "in extenso" when necessary from the part of the opinion directly in point and sufficiently to indicate on the face of the quotation that it is not abstracted from a larger body which, as a whole, would give a different conclusion. The language of the quotation should include, when such exists, statements which in form plainly identify the material as the final ex-

pression of the court upon the point. Unless the quotation be so obviously clear in application as to be unmistakable, the brief should add an explanation pointing out precisely how and why it is controlling upon the point. It is a serious mistake to lay a sure foundation and then lose the effect through a credulous assumption that the court will make the desired application. Sometimes the court may feel so disposed, but no such risk should be incurred.

It is the function of the brief to make a finished job. Many times the influence of a case is enhanced by showing with what regard it has been held by other courts and its extensive application as authority in other cases. The citation is not complete unless it appends the names of the parties, the volume and page of the report where found and parallel citations to both official and nonofficial sources.

(2) CYCLOPEDIA CITATION.—References to "Law", as distinguished from "The Law", may sometimes be advantageous and citations to encyclopedias for this purpose are often made. The authority is no more effective than the reputation of the set of books while sometimes a particular article in an encyclopedia is above or below the value of the set as a whole. Nevertheless a quotation from an encyclopedia not infrequently puts the exact distinction in particularly fine form and is therefore extremely beneficial in a supplementary capacity. The quotation of a principle with a case or two appended in the encyclopedia in support of the same taken together have a particularly strong effect since it is an application made by both court and commentator.

(3) TREATISE CITATION.—The use of treatises is of still more limited extent. Very few have a reputation with the profession sufficient to warrant a citation from their pages, and yet there are some noted exceptions which have great weight with the courts. And there is at least one unique advantage in such a reference. Some of these investigators into legal lore have been so exhaustive in their research that a court will always hesitate at their name to rule in opposi-

tion without some special inquiry. When thus given, the title, edition, volume, page and section should also be furnished in order that a corroboration may not only be facilitated but invited.

(4) **PRINTING ART.**—Last but by no means least are the mechanical accessories of the printer's art. In some states provision is made by law for such details, and when so done must be strictly followed, but even then not all of the advantages of spacing, lettering and margin indentation, etc., are always specified so that the briefmaker should see that the argument shall have every advantage which skillful form can insure, and this, it should not be overlooked, is a matter of considerable importance.

The Conclusion.—Just as the introduction serves as a preliminary clearing table for materials which, while not strictly a part of the argument proper, yet have a bearing upon the issue involved, so also the conclusion is at liberty, besides presenting a summary of the argument, to add whatever of a general nature is pertinent to the decision of the case. One limitation to this, however, is that it be not a detached fragment of what should have been in the argument itself, nor a sermonic diatribe outlining the duties of the court, nor a legal mourner's bench to vent the feelings of outraged justice. The conclusion at its best should be a dignified review of the main contention in brief space with more or less freedom of the running composition in order to emphasize such phases as would otherwise fail to occupy the attention of the court in the proper and merited proportions. Under no circumstances should counsel shift even to the slightest degree the grounds and conclusions reached in the argument proper. The argument is presumed to have been finished, but not infrequently a question of discretionary attitude on the part of the court is involved in the decision and a tactful quotation from some eminent jurist upon such prerogative of the court or trend of the times is an acceptable justification for the decision pleaded.

CHAPTER XXIV.

ILLUSTRATIVE BRIEFS.

Preliminary Explanations.

In order that the brief maker may more fully appreciate the difference between material improperly briefed and the same material organized according to the principles of good briefing, we here sublend two briefs made from the same materials, the first an exact reprint of the original form in which it was filed, and the second a reconstruction of the same brief, preserving it practically intact so far as the substance of the argument is concerned and as much of the phraseology as is possible consistent with its change in form. We shall therefore specify at the beginning an enumeration of the most important defects to be found in the brief and in its reconstruction shall aim at the elimination of these imperfections, thus:

The following brief fails to observe the principles of good briefing in the respects here mentioned:

1. It omits to give a complete epitome of the case and by what development it came into the Supreme Court.
2. Does not render sufficiently conspicuous the different phases of content in its statement of the case by means of appropriate subdivisions and headings. To the eye it presents a meaningless stretch.
3. Does not set out the specifications of error under a bold and separate heading which their importance demands and which the Supreme Court especially requests.
4. Enumerates a number of errors, some of which represent different aspects of the same point and which should have been reduced to issues which are as distinct as possible for the sake of clarity in the argument.

5. Fails to argue all of the specifications of error, but utilizes some as issues without explaining the omission of others and then adds new and different propositions as issues without indicating their relation to the errors specified.
6. The main propositions set out for argument are neither entitled ERRORS nor ISSUES and should have been consistently entitled one or the other and not a mixture of the two. Errors of the court are always issues, but they may depend upon other issues more fundamental which are not errors of the court.
7. Some of the main propositions for argument, namely, numbers II, IV and V, are what is known as crowded headings; that is, number II contains surplus descriptive material, number IV contains, according to its phraseology and punctuation, three distinct propositions, while number V contains a proposition combined with a reason therefor. No heading standing as a proposition to be proved by evidence subtended should contain more than one simple proposition, otherwise confusion arises as to which part the evidence is directed.
8. From phraseology in the discussion of heading No. I the impression is made that the proposition affirms one thing and the evidence supports another. Thus the proposition raises the question of exclusive jurisdiction while the evidence seems merely to support the fact of jurisdiction alone. The two are not identical—there might be jurisdiction and yet it not be exclusive, it might be concurrent. This confusion should have been avoided by careful phrasing.
9. The brief fails to set out a preliminary summary of its points and authorities before entering upon the argument itself. This is always advisable for it gives the court a preliminary survey and grasp upon all of the issues, their subsupports and the authorities relied upon.
10. This brief separates each main proposition to be proved from its proof below by the title, ARGUMENT. This is bad form since the proper place for such title is at the beginning of the entire body of the brief which deals with argument and not spliced in between the propositions and their consecutive supports. The brief in general should be set out under the following most distinct divisions, to wit: PRELIMINARY STATE-

MENT, STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, POINTS AND AUTHORITIES, ARGUMENT and CONCLUSION.

11. The brief fails to argumentatively outline its evidentiary subpoints in support of the main propositions, but on the contrary employs a running discursive essay style which either makes it necessary for the court to pick out these fundamental propositions with painstaking labor or to overlook some of them. It is the business of the brief to set out in proposition outline the entire argument down to the last evidentiary details so that the eye can grasp the line of inference in a moment, in order to facilitate understanding, to conserve the cumulative effect, and to render their inferential relations to each other and the main proposition as conspicuous as possible.
12. Since the evidence in support of the main proposition is not differentiated and explicitly organized in relation to points above and below, no argumentative connectives, such as "for," and "because," are systematically employed although these are the most pointed forms which language supplies for the setting out of inferential argumentative relations. All logical connections in the argument should be briefed out in explicit terminology for it is the essence of good briefing, not merely to set down points in order, but pre-eminently to set out the connective hinges by which the line of reasoning is jointed together and made an unbreakable succession.
13. The conclusion is not distinctly marked off and lacks summing-up force. After the argument has apparently come to an end and a conclusion begun there seems to be a feeble attempt to reargue the case with some new matter which should have been introduced before. A conclusion should be a trenchant summary only, not too long, and never leave the impression of a trailing argument.

ILLUSTRATION I.

APPEAL BRIEF.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1914.

No. 808.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

v.

S. MIMS,
Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Defendant in error, as plaintiff in the District Court of Dallas County, Texas, filed a suit May 19, 1911, (Printed record, pp. 1 and 4) against plaintiff in error as defendant, alleging that it was a corporation organized under the laws of some state other than Texas, and engaged in the life insurance business, further alleging that it had issued to him a policy in 1879, and that thereafter, on May 29, 1885, had exchanged it for one for three thousand dollars (\$3,000) issued to his wife as beneficiary. (Printed record, p. 1.)

On February 14, 1913, plaintiff filed an amended petition in lieu of his original petition, in which he materially changed his allegations. He then alleged that in the year 1870 there was incorporated under a general law enacted by the Congress of the United States a certain insurance order or company, the "Supreme Lodge, Knights of Pythias", otherwise known

and frequently denominated thereafter as "Supreme Lodge, Knights of Pythias of the World"; that by the express terms of the general law of the congress under which said corporation was incorporated, the life of said corporation expired in the year 1890; that said company continued after its incorporation down to the time of its death by law, or expiration of its charter in said year 1890, to engage in the business of life insurance, issuing policies of insurance upon the lives of persons; that on April 11, 1879, plaintiff obtained from said company a written policy of insurance or benefit certificate insuring plaintiff's life in favor of a beneficiary or beneficiaries therein named; that afterward, on May 29, 1885, said corporation so issuing said policy issued and delivered to plaintiff in lieu of said former insurance policy another written policy of insurance or benefit certificate, wherein and whereby it obligated itself to pay to plaintiff's wife, Mary J. Mims, the sum of three thousand dollars (\$3,000) upon notice and proof of plaintiff's death in good standing at the time of his death in what was denominated and known as the "Endowment Rank" of said corporation, said benefit certificate further stipulating and providing that if, at plaintiff's death, one monthly payment to the endowment fund by members holding an equal amount of endowment (meaning an equal amount of endowment to that of plaintiff) should not be sufficient to pay the amount of endowment held by plaintiff (meaning his \$3,000), that the benefit to be paid upon such insurance policy in case of plaintiff's death should be a sum equal to one payment to the said endowment fund by each member holding an equal amount of endowment. That plaintiff continued carrying his said policies with said company until the expiration of its existence by terms of law, as aforesaid, whereupon the officials in charge of the affairs of said company at its decease, and their successors, continued thereafter for a period of several years, and until the incorporation of the defendant herein in the year 1894, to take and acquire and remain in possession of the assets of said deceased company, and to continue and carry on as formerly its business as an unincorporated association, but still under the name "Supreme Lodge, Knights of Pythias", or "Supreme Lodge, Knights of Pythias of the World"; that thereupon, and thereafter, and in the year 1894, the defendant herein, the "Supreme Lodge, Knights of Pythias" was incorporated under a special act of the Congress of the United States, since which time said defendant has continued to be, and is now a corporation duly incorporated and engaged in the business of life insurance, issuing policies of insurance upon

the lives of persons: that by the express terms and conditions of the charter of the defendant company it was provided and stipulated that

"all claims, accounts, debts, things in action, or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section one of this act, shall survive and succeed to and against the body, corporate and politic, hereby created,"

whereby it was expressly stipulated and provided that the defendant in accepting its charter should undertake and obligate itself in all respects to carry out the terms of all insurance policies of the former corporation aforesaid, or of said unincorporated association. Furthermore, plaintiff avers, and shows the fact to be, that the defendant at all times since its incorporation, has accepted dues, payments and premiums from the plaintiff, and in all respects bound itself in law and in fact, to carry out plaintiff's said contracts of insurance. The defendant acquired and took over all the assets of said former corporation and of said unincorporated association.

That at all times plaintiff was and remained a member in good standing of the Endowment Rank of said corporation which issued said policies, and in all respects continued and remained in good standing in both of the corporations and unincorporated association mentioned herein, and continued at all times to carry out and comply with all the terms and conditions of this insurance aforesaid, and desired and expected to continue to do so, notwithstanding which fact the defendant herein, while plaintiff's said insurance was in full force and effect, did on or about August 2, 1910, through its Supreme Lodge, being its supreme governing body, wrongfully and illegally passed and promulgated and put into force, certain pretended laws or amended laws, wherein and whereby the defendant demanded and required of plaintiff that plaintiff should, beginning with the month of January, 1911, pay the defendant the large sum of thirty-four dollars and eighty cents (\$34.80), monthly dues and assessments, as a condition precedent to the recognition and maintenance of plaintiff's insurance with defendant, whereas theretofore defendant was requiring of plaintiff the payment of only seven dollars and thirty-five cents (\$7.35) dues and assessments, per month, as a condition precedent to the recognition and maintenance of said policies, and certainly was not authorized in law to exact more than said last mentioned sum, and not even that amount,

as it was a part and condition of plaintiff's contracts of insurance as aforesaid, that the monthly rate of assessment to be paid by plaintiff should never at any time exceed the amount of, to wit, three dollars and sixty cents (\$3.60) per month], by virtue of the fact that there was established in the year 1884 what was known and denominated as the Fourth Class of the Endowment Rank of said first incorporated company, as aforesaid, and it was expressly provided by the constitution or by-laws of said company, which provisions became and were a part of plaintiff's contracts of insurance aforesaid, that the Endowment Rank, for the payment of benefits in said Fourth Class should be derived from monthly payments by each member (of which plaintiff was one), said payments to be for each one thousand dollars (\$1.000) of endowment, and to be graded according to the age of the member at the time of making application (meaning his application for membership in said Endowment Rank) and his expectancy of life, the age to be taken at the nearest anniversary of his birthday; that the monthly payments should be based upon the average expectancy of life of the applicant, and should continue the same so long as his membership continued, by reason of the monthly assessment rate to be paid by plaintiff upon his said three thousand dollars (\$3000) of insurance was expressly limited and agreed never to exceed said sum of, to wit, three dollars and sixty cents (\$3.60) per month.

That defendant not only passed and demanded, as aforesaid, in the year 1910, an illegal raise in rates against plaintiff, as aforesaid, but it further then and there breached plaintiff's contracts with it, as aforesaid, in that, in passing said laws or pretended laws, it expressly declared and announced that the Supreme Lodge of the defendant should have the right to change, increase or adjust the schedule of rates in the fourth class of defendant (in which plaintiff with his insurance aforesaid was) and which attempt to reserve said right in said Supreme Lodge was illegal, unauthorized, and a further breach and repudiation of plaintiff's said contracts of insurance with defendant; that not only so, but in so attempting to pass said laws of 1910, the defendant further breached its contract of insurance with plaintiff, in that, it then and there undertook to provide and declare that members of its fourth class should have no divisible interest in the funds or properties of the insurance department of the defendant, nor be entitled to any apportionment or application of the same, which was a further breach and repudiation of plaintiff's contracts of insurance. (Printed record, pp. 5, 6 and 7.)

These allegations were followed by appropriate allegations of the forfeiture by this defendant of the policy on account of the fact that defendant in error refused to pay the increased rates. He also prayed for the recovery of all premiums paid to the old corporation, the unincorporated society, and the defendant, with interest thereon from date of payment.

On March 1, 1913, defendant, plaintiff in error here, filed its amended answer, joining issue with the plaintiff on all the allegations in the amended original petition, except such as were therein specially admitted. Its answer in part was as follows:

"For further and special answer to plaintiff's petition, defendant denies that it ever issued or executed or became responsible for the certificate sued on in this case by the plaintiff." (Printed record, p. 17, subdivision (7), first three lines.)

Again defendant specially denies that it ever in any manner, in writing or otherwise, assumed the payment of the certificate sued on in this case, as alleged in plaintiff's petition, or has ever obligated itself in any way, binding under the law, to carry out the alleged contract made between the plaintiff and the old corporation as evidenced by the certificate alleged to have been issued or assumed by the unincorporated society and sued on in this case. (Printed record, p. 22.)

The section of the charter of plaintiff in error relied on by the defendant in error as an assumption of the certificate sued on is Section 3, which reads as follows:

"That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in Section 1, of this Act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time."

Plaintiff in error insisted that the assumption of the obligations of the "present" Supreme Lodge, Knights of Pythias, mentioned in that section meant the unincorporated society, and not the old corporation which had expired four years before the incorporation of defendant, plaintiff in error here.

Plaintiff in error also denied that it had ever received any

of the assets of the old corporation or of the unincorporated society.

As to the authority of plaintiff in error to raise the assessments or increase the rates charged, plaintiff in error here, defendant there, pleaded among other things the following:

"Defendant admits that it passed the laws hereto attached and marked "Exhibit B", at the August, 1910, convention of its Supreme Lodge, but defendant avers that said laws were just, reasonable and necessary; that it had the authority and power to pass same, and that said laws, by reason of the facts stated in answer and by reason of the further facts hereinafter stated, were binding and obligatory upon plaintiff, and defendant avers that plaintiff's failure to comply with said laws operated as a forfeiture of any rights plaintiff had under his certificate of insurance sued on in this case." (Printed record, p. 26.)

The defendant avers that defendant's rights and any claim of plaintiff are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank of the insurance department of this defendant, and the amendments thereto adopted by this defendant, and that any obligation of this defendant to the said plaintiff under the certificate alleged to have been issued to him in this case and sued on herein, are governed by the character of this defendant, its laws, rules, and regulations governing the rights of the members of the order of the Supreme Lodge, Knights of Pythias, or amendments thereto adopted by this defendant.

The defendant alleges that under the constitution, laws, rules and regulations of this defendant, under which it was acting at the time it was incorporated, and under which it has acted since its organization as a corporation, the right was and is expressly given the defendant to increase its rates of assessments, and the rates of assessments levied as expressly stipulated in its laws to be in force and effect so long as a member remained a member of the Endowment Rank or insurance department of this defendant, unless otherwise provided for by the Supreme Lodge or Board of Control of the Endowment Rank of the Knights of Pythias. In other words, that by the charter, laws and regulations adopted by this defendant since its incorporation and under which it was acting when it became incorporated, and under which the said unincorporated society was acting at the time plaintiff became a member and at the time this defendant was incorporated, the express right

was given and retained by said unincorporated society, and by this defendant, all of which were acquiesced in and ratified by the plaintiff, to increase rates of assessments on any certificate issued by this defendant or by said unincorporated society, or for which this defendant or said unincorporated society might in any way become responsible for the payment of, either express or implied. (Printed record, pp. 21, 22.)

Defendant further avers that the charter of said corporation known as The Supreme Lodge of the Knights of Pythias of the World, expired by limitation on or about May 5, 1890, and that from said date up to about June 29, 1894, no corporation existed, but a society known as The Supreme Lodge of the Knights of Pythias acted as a fraternal insurance company without any charter and without being a corporation until on or about June 29, 1894. That under the laws existing when said unincorporated society began acting as a fraternal insurance company, and under which laws said unincorporated society acted and by which it was governed, and under the laws adopted by said unincorporated society during its existence, express power was given to, and existed in, said unincorporated society and its supreme governing body to change and amend its laws and to change and raise the rates of assessments; * * * That in the year of 1894 this defendant, The Supreme Lodge, Knights of Pythias, was incorporated as above alleged, by an act of congress approved by the President, June 29, 1894. That subsequently, in the year of 1900, said act of incorporation of this defendant was amended, and that subsequently in 1907 said act of said incorporation was further amended by the Congress of the United States and that this defendant has been acting under said acts of incorporation and amendments thereto since said date of its incorporation. That under the acts of incorporation of this defendant and amendments thereto, express power was given to change and amend its by-laws, rules and regulations and that such rights were also given and clearly set forth and defined in the constitution, laws and regulations of the supreme governing body of this defendant. (Printed record, p. 20.)

The section of the charter upon which defendant based its right to raise the rates reads as follows:

"Section 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State."

Section 5 fixes the character of insurance which it should conduct. It reads as follows:

"That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent."

Defendant averred that if it ever received any dues and assessments from defendant in error it was under the following circumstances:

"If it did receive such dues, assessments or payments, * * * it did so upon obligation both expressed and implied upon the part of the plaintiff that he would comply with the laws in force, existing, and subsequent to, the time this defendant was incorporated as aforesaid, whether those laws were the laws adopted by the unincorporated society or by this defendant. That plaintiff, before and since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws, and under which it operated at the date of its incorporation, and adopted by it from time to time, or with notice thereof, expressed or implied. That frequently since this defendant became a corporation, the plaintiff dealt with it as such in paying assessments upon certificate or certificates issued to plaintiff by either the former corporation or said unincorporated society, this defendant increased and changed the rates of assessments and levied higher rates of assessments upon the plaintiff; that the plaintiff had acquiesced in such previous increases of his rates of assessments both by the unincorporated society and by this defendant, and paid the same and has paid special assessments previously required of him, both by said unincorporated society and by this defendant under his certificate of insurance sued on in this case. * * * That plaintiff, by his acts, has acquiesced in and ratified by his conduct and action the rights of this defendant and the rights of said unincorporated society to so amend the laws as to the rates of assessments, and that by such action the plaintiff had waived all objection to the exercise of such rights by this defendant, and this defendant avers that the raise in rates complained of by the plaintiff, were and are binding upon the plaintiff." (Printed record, pp. 20 and 21.)

The defendant avers that defendant's rights and claim of plaintiff are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank of the insurance department of this defendant, and the amendments thereto adopted by this defendant. (Printed record, p. 21.)

Defendant avers that at the time of the increase of rates by this defendant, complained of by the plaintiff, the same was necessary by reason of the fact that defendant's income was not sufficient to meet the liabilities accrued and to accrue under fourth class certificates issued to various members of its insurance department, and that in order to protect said certificate of plaintiff and all other certificates in said fourth class, and in order to promote and protect its own existence, this defendant was compelled to raise its rates, and that such rates were in contemplation of the parties under contract sued on. (Printed record, p. 25.)

Defendant avers that plaintiff's application upon which he obtained the certificate sued upon in this case, contained a provision whereby the insured agreed that he would be governed by and the contract of insurance should be controlled by the laws and regulations enacted by the corporation issuing said certificate governing said rank then in force or that might be thereafter from time to time enacted by the Supreme Lodge, or submit to the penalties therein contained. (Printed record, p. 24.)

Defendant avers that when it became a corporation and received dues, assessments or payments from the plaintiff in this case, it did so upon the obligation both express and implied, upon the part of the plaintiff, that he would comply with its laws in force, existing at and subsequent to the time this defendant was incorporated as aforesaid. That the defendant would not have received said premiums, and had no authority to receive them upon any other basis. The plaintiff, since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws adopted by it from time to time, or with notice thereof, express or implied. (Printed record, bottom p. 14 and top of p. 15.)

Defendant also alleged in its amended answer, among other things, the following:

"That members of the Endowment Rank, of said old incorporation, said unincorporated society and of this defendant and of the insurance department of this defendant, occupied and always have occupied a

dual position, each of said members being the insured on the one hand, and as such entitled to the benefits conferred upon them by their contract, and each of said members of said old corporation, said unincorporated society and of this defendant being on the other hand insurers, and as such bound to comply with all of the laws of said respective associations and to contribute to that end and into their respective funds, a sufficient amount to enable them and each of them to carry out the contracts made with its members, or for which they might become liable to its members.

Defendant avers that occupying such dual position which plaintiff occupied toward said corporations and said unincorporated society, the plaintiff is bound under the laws and regulations of same to contribute as required by same any and all amounts made necessary in order to enable said associations and corporations to carry out the contracts with its members, which contract plaintiff was as much obligated to carry out as was either of the other members of each of said societies or corporations, and it would be inequitable and unjust for this plaintiff to be permitted to recover from this defendant contributions or the value of his certificate, when he is an insurer, together with all of the other members of said fraternal association, is obligated to make such payments for the purpose of carrying out contracts entered into by said association with its respective members, plaintiff being one of the members, who had promised to pay certificates for which said association might become liable." (Printed record, bottom p. 22 and top of p. 23.)

On the trial of the case there was no evidence offered that plaintiff in error, defendant in the lower court, had assumed the certificates issued by the old corporation, except the section of the charter pleaded by defendant that it had assumed certain obligations of the "present" Supreme Lodge, Knights of Pythias, and the further fact that since the incorporation of the defendant, plaintiff in error here, viz., in June, 1894, it had received the dues and assessments on the certificate issued by the old corporation in 1885. There was no evidence that the unincorporated society received any assets from the old corporation, or in any manner assumed the debts of the old corporation, unless the fact that it received dues and as-

assessments was evidence of such assumption, or that the defendant received any assets from either the old corporation or the unincorporated society.

It was proved by W. O. Powers, the secretary who had charge of the books of the concern, as follows:

"When the present corporation was formed there was nothing to take over from the unincorporated concern. They took over its books and assumed the liabilities of the unincorporated society, but there were no funds on hand. I do not remember the exact sum, but there was practically nothing on hand. I think they were in arrears at that time. The money had all been used in paying death losses from year to year. The money had been used in settling claims it had acquired up to that time. The corporation did not take over the affairs of the unincorporated Knights of Pythias." (Printed record, bottom p. 162.)

Again the witness says:

"None of the funds of the unincorporated society went into this new corporation." (Printed record, p. 162.)

There was absolutely no evidence that the old corporation turned over any assets to the unincorporated society, or to the new corporation. The testimony of Powers was the only evidence upon this point.

The actuary, Mr. S. H. Wolfe, testified that he had made a thorough examination of the affairs of the plaintiff in error, and said:

"In my opinion *as an actuary, it was necessary* for the Supreme Lodge at its convention in 1910 to adopt the laws that were there adopted, whereby the assessments paid by the members of the fourth class were changed; my reason for holding this opinion is that the assessments paid by the members in the fourth class were insufficient to enable the insurance department to continue to pay to the beneficiaries the amounts of the certificates as the certificates matured as death claims.

In my opinion the action taken by the Supreme Lodge at its convention in 1910 was *not only reasonable and fair, but was absolutely necessary to enable the beneficiaries to receive the amounts of the certificates when they became due.* This conclusion is

based upon my careful study of the assessments then being paid by the members in the fourth class, the mortality experienced by said class, and *the deficiency in the funds which the fourth class should have had in its mortuary fund if the rates were not to be increased.*" (Printed record, p. 142.)

He further testified as follows: the amount of the mortuary fund in the fourth class (being the class in question) at the end of June, 1910, was seven hundred twenty-three thousand dollars (\$723000). At the end of July, 1910, was seven hundred thousand nine hundred thirty dollars (\$700-930). (Top of p. 143 printed record.)

He further offered an exhibit showing the gradual decrease of this mortuary fund since December, 1908, which is as follows:

December 31, 1908.....	\$1,274,474
January 31, 1909.....	1,217,012
February 28, 1909.....	1,189,247
March 31, 1909.....	1,176,096
April 30, 1909.....	1,143,010
May 31, 1909.....	1,061,920
June 30, 1909.....	1,037,186
July 31, 1909.....	1,003,178
August 31, 1909.....	992,329
September 30, 1909.....	982,106
October 31, 1909.....	967,790
November 30, 1909.....	939,279
December 31, 1909.....	872,876
January 31, 1910.....	848,063
February 28, 1910.....	823,769
March 31, 1910.....	807,995
April 30, 1910.....	819,810
May 31, 1910.....	756,981
June 30, 1910.....	723,030
July 31, 1910.....	700,930

(Printed record, p. 144.)

In the application of S. Mims for membership, in 1879, he used the following language:

"I hereby agree to conform to, and obey the laws, rules and regulations of the Order governing this Rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained." (Printed record, p. 137.)

He testified as follows:

"I joined this fraternal organization for the purpose of insuring my life for the benefit of Mrs. Mims, and also for the purpose of helping other Knights of Pythias. I presumed that the organization was not for profit, but for protection of the individual members constituting the insurance circle. I supposed that the only source of revenue to meet my policy and other policies issued by the insurance department would be obtained from assessments on those insured, and I also presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase. I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be less per head on those five thousand members than it would be when the ranks had been reduced to two thousand. As the membership decreased the death rate increased and they would be obliged to increase the assessments if they met their obligations according to the contract; that is, on the assessment plan. I presumed that this entire insurance scheme was based on the assessment plan.

If you reduced the membership to two thousand and the death rate increased as they grew older, you certainly would have to increase that rate if you met the obligations. I do not remember whether they raised the rates on me in 1888 or 1901. They raised them so often that I can not remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise, when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910, when I declined to pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonged to the lodge and my dues are paid up now. I belong to the Red Cross

Lodge at Ft. Worth." (Printed record, p. 120, p. 121 down to Redirect Examination.)

The charter of the old defunct corporation obtained the 5th of August, 1870, contained, among other things, the following provision:

"That the Supreme Lodge shall have power to alter and amend its constitution and by-laws at will."
(Printed record, p. 93.)

The certificate sued on contains, among other things, the following statement:

"This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing the date of April 11, 1879, and his absolute surrender of the certificates heretofore held by him in first and second classes for cancelation, as requested in his application for transfer to the fourth class bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws, the sum of three thousand dollars (\$3000) will be paid by the Supreme Lodge, Knights of Pythias of the World to Mary J. Mims, etc.
* * *

Provided, however, that if at the time of the death of said Brother, one monthly payment to the endowment fund by members holding an equal amount of endowment, shall not be sufficient to pay the amount of endowment held by said Brother, the benefit to be paid, in case of death shall be a sum equal to one payment to the endowment fund by each member holding equal amount of endowment held by said Brother. And it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and

void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof." (Printed record, p. 98, top of p. 99.)

The case came on for trial, and the defendant, plaintiff in error here, asked the court for a peremptory instruction against the plaintiff for itself. (Printed record, pp. 56, 57.)

That being refused, defendant asked the court to instruct the jury, as follows:

"In the event the first three special charges are not given, defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and the undisputed evidence showing that plaintiff after the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution and by-laws of this defendant corporation, and the court instructs you that under such charter, constitution and by-laws the defendant had the right to raise the rates of the members of the fourth class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations to the members of the fourth class, then you are instructed to find for the defendant." (Printed record, p. 59.)

Defendant also requested the following charge:

"In the event that the first three special charges shall be refused defendant asks the following:

Gentlemen of the Jury: You are instructed that the plaintiff and all those in the fourth class of the defendant's insurance department were mutual insurers of each others' lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay these certificates as they matured, they had the implied power to increase the rates to such point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from

the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant." (Printed record, bottom p. 58, top of p. 59.)

The court, at the request of plaintiff's counsel, peremptorily instructed a verdict for the plaintiff for three thousand six hundred and sixty-three dollars and thirty-five cents (\$3663.35) which the jury, under directions of the court, immediately returned into court. (Printed record, bottom p. 62.) For this amount the judgment was rendered. (Printed record, pp. 63, 64.) The necessary steps were then taken by motion for a new trial, assignments of error, etc., and the case was carried to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the state of Texas. It was there in all things affirmed. (Printed record, pp. 178, 179.) The judgment of affirmance, at a later day of the term, was modified and reduced to the sum of three thousand and fifty-two dollars and thirty-five cents (\$3,052.35). (Printed record, pp. 206, 207.) Application was then made to the Supreme Court of the state of Texas for a writ of error to review the judgment of the lower court. The writ of error was refused, one of the three justices dissenting. (See Printed record, bottom of p. 207.) Application was then made to Honorable Anson Rainey, Chief Justice of the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, for writ of error (Printed record, pp. 108, 109, 110 and 111), which was by him granted, and the case brought here (Printed record, p. 212), plaintiff in error making the following assignments of error:

I.

"The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the state of Texas erred in determining and holding that the questions involved in said case and presented to it for decision were not ones of exclusive federal jurisprudence, and making it incumbent upon that court to follow the rules laid down by the Supreme Court of the United States in determining the rights of plaintiff as against the defendant.

II.

The said court erred in holding and determining in said case that by the terms of the charter of your petitioner, it, Supreme Lodge, Knights of Pythias, was obligated to perform the contract of insurance

upon which said Mims' suit was predicated, and made your petitioner liable in damages to appellee for a breach thereof.

III.

The said court erred in holding and determining that the rerating of appellee, that is to say the raising of the monthly assessments to the sum of thirty-four dollars and eighty cents (\$34.80) per month against him, was unauthorized by the terms of your petitioner's charter.

IV.

Said court erred in holding and determining in its said opinion that the rerating or raising of the monthly assessments to the sum of thirty-four dollars and eighty cents (\$34.80) constituted a breach of plaintiff's insurance contract, and entitled him to recover from your petitioner the sums paid to it, the unincorporated society, and the old corporation, which had issued said policy.

V.

Said court erred in holding and determining that there was any evidence, other than the provision of petitioner's charter, which would support the judgment to the effect that your petitioner, plaintiff in error, had assumed the contract of insurance upon which appellee's suit is predicated.

VI.

Because said court erred in inferentially holding that the old corporation issuing the contract sued upon, did not have authority to rerate or raise said assessments above the amount of three dollars and sixty cents (\$3.60) per month.

VII.

The said court erred in holding that your petitioner was without power under the terms of its charter to issue or assume any contracts of insurance except as same should be governed and limited by the charter and laws of your petitioner passed in conformity thereto.

VIII.

The court erred in holding that the agreement of plaintiff to conform to and obey the laws, rules and regulations of the Order governing the rank of insurance now in force (which meant the rank to which plaintiff belonged), or that may be hereafter enacted, or submit to the penalties therein contained, did not authorize your petitioner to pass any laws in respect to said insurance that were reasonably necessary.

IX.

The said court erred in determining that the obligation in the application for the insurance certificate sued upon to pay all monthly dues required, did not obligate the plaintiff to pay the assessments made by your petitioner.

X.

Because said court erred in rendering a judgment against your petitioner for any sum whatsoever."

After stating many of the facts the Honorable Court of Civil Appeals disposed of the federal questions, as follows:

"Appellant presents several assignments of error and urges many propositions thereunder in support of its contention that the trial court erred in directing the jury to return the verdict rendered. We do not regard it necessary to state and discuss seriatim the propositions contended for by appellant, and shall state without regard to the order in which these propositions appear in the brief, our conclusions, which will sufficiently indicate the questions raised.

1. We are not aware of any authority supporting the contention of appellant that the question (or any of the questions) presented for decision to be one of exclusive 'federal jurisprudence,' and making it incumbent upon this court to follow the rules laid down by the Supreme Court of the United States in determining the rights of the plaintiff, as against the defendant in this case. * * *

2. The evidence is sufficient to show that the defendant, immediately upon its incorporation, took over and absorbed the membership and entire insurance business of the corporation which issued the policies

or contract of insurance involved in this suit, and of the unincorporated society which succeeded it, and that continuously from the date of its incorporation in 1894 up to January, 1911, received and accepted from appellee monthly payments of dues and assessments as a consideration for carrying out his contract of insurance, and these facts rendered it responsible in law for a breach of said contract in the same way and to the same extent as if the contract had been issued in the first instance and by it broken. Evidently, defendant contemplated this when it applied for and obtained its charter. Besides, we think the provision in the defendant's charter, which is set out in our statement of the facts, obligated the defendant to perform the contract of insurance upon which appellee's suit is predicated, and made it liable in damages to appellee for a breach thereof." (Printed record, p. 172.)

The provision of the constitution referred to is found on p. 171 of the printed record, and reads as follows:

"The defendant's charter granted in 1894, provides that, 'all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any laws which provide for the extinguishing of claims or contracts by limitations of time.'"

Again, touching the power of rerating, the court said:

"The rerating of appellee, whereby the assessments against him were so greatly increased, was, we believe, unauthorized and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon it." (Printed record, p. 173.)

The court also found that:

"The plaintiff in his application for the certificates issued to him in 1879 and 1885, agreed to conform to and obey the laws, rules and regulations of the

order governing the Endowment Rank of the old corporation, 'now in force, or that may hereafter be enacted, or submit to the penalties therein contained'; that the certificates issued to him were conditioned that 'in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force, or that may hereafter be enacted,' there would be paid to Mary J. Mims, plaintiff's wife, the sums therein specified, and declared that it was understood and agreed that any violation of the mentioned conditions herein, or the requirements of the laws in force governing said rank should render the certificate void; that in the laws passed in 1884 it is provided that 'these laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias, by a two-thirds vote.'" (Printed record, p. 173.)

The court further held:

"The contract of insurance entered into with the appellee did not stipulate that appellant should have the right to increase the rate of assessment against him and the reservation of a general power to amend its by-laws, nor the recitation in said contract to the effect that it was issued upon the condition that the appellee paid to the Endowment Rank 'all monthly payments as required and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted,' authorize appellant to increase the rate of assessments as the record discloses was done. While a fraternal insurance society or association may so amend its constitution and by-laws to make 'reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or implicitly by the contract itself.' And it seems clear that such a corporation may expressly reserve the right and power to increase the monthly assessments of its members, but such reservation must be so explicitly and clearly stated in the contract itself or in some paper forming a part of the contract, that the member insured is fully advised that the terms of the contract he is entering into may be

changed by the insurer in that respect. By the terms of the certificate issued to him, and the by-laws fixing the rate of his monthly assessment at the time of its issuance, which became and was a part of said contract, appellee knew what he was obligated to pay and what he was entitled to receive, and under the general reservation to amend its constitution and by-laws and the general stipulation in the contract, to the effect, that, appellee would pay all monthly payments as required and fully comply with all the laws governing the Endowment Rank, as a condition upon which the money therein specified was to be paid to his beneficiary, no amendment materially changing and impairing the contract as made with him could be enacted or adopted that would be binding upon him." (Printed record, p. 174.)

POINTS OF LAW AND ARGUMENT.

We submit the following propositions:

I.

The Honorable Court of Civil Appeals erred in determining that the questions involved in this case were not ones of exclusive federal jurisprudence.

ARGUMENT.

As hereinbefore shown the plaintiff in error was adjudicated to be liable to defendant in error by the Honorable Court of Civil Appeals, first, because by the terms of its federal charter granted by congress it had assumed the obligations of the old corporation; and, second, that it had no power granted it by its federal charter to increase the rates of insurance, which the court adjudged to be a voluntary breach of its contract.

The construction of these two provisions of its charter were pre-eminently questions for the federal court, and the Court of Civil Appeals erred in not recognizing the rule so well established that decisions of federal courts in respect to federal statutes are conclusive on state courts. The state court would have been quick to have recognized the reciprocal rule that the decisions of a state court in respect to the effect of a state statute are conclusive on the federal court. It is a curi-

ous fact that the learned Court of Civil Appeals did not recognize this elementary principle.

The charter of the plaintiff in error is a public statute of the United States (28 Stat. at L., 96, 97). By virtue of the Constitution of the United States, this court is the final arbiter of all questions relating thereto and depending thereon. It is said in the case of *Texas, &c., R. Co. v. Hill*, 237 U. S. 208, 37 L. ed. 918, that "as a corporation created by an act of congress, the plaintiff in error is inherently entitled to invoke our jurisdiction. Hence, the motion to dismiss is without merit." It is expressly held in the case of *Texas, &c., R. Co. v. Marcus*, 237 U. S. 215, 37 L. ed. 924, that the judgment of a Federal Circuit Court of Appeals in an action against a corporation, created by an act of congress may be brought up for review in the Federal Supreme Court by a writ of error. Section 237 of the Judicial Code provides that

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgments or decrees of such state court, and may at their discretion award execution or remand the same to the court from which it was removed by the writ."

That the judicial construction of a charter of a federal cor-

poration constitutes a suit "arising under the laws of the United States" see

Pacific R. R. Cases, 115 U. S. 1, 29 L. ed. 319;
Union Pac. R. Co. v. Harris, 158 U. S. 326,
39 L. ed. 1003.

It is well established that where a suit is brought in a state court and a federal question is presented the defendant may permit the case to go to judgment and take his appeal to the Supreme Court of his state and, if the decision of the court is against the federal right for which he contends, he may then sue out a writ of error to the Supreme Court of the United States and present the question before that tribunal. The case comes before that court presenting exactly the same questions as would be presented if the defendant had taken the other course—had petitioned for a removal to the federal court, and had carried the case to the Supreme Court of the United States by way of appeal or writ of error from the federal court. The plaintiff in error in this case took the former course. He litigated the case to final judgment in the state court and carried the cause to the Court of Civil Appeals of the state of Texas, where his federal right for which he had contended was denied. This was the highest court to which the plaintiff in error could appeal in that state. It therefore sought by a writ of error to that court to have its federal right adjudicated in this court.

In the recent case of *Supreme Council Royal Arcanum v. Green*, 237 U. S. 531, 59 L. ed. 1089, this court reversed the judgment of the Court of Appeals of New York, which court had refused to give full faith and credit to the decision of the Supreme Court of Massachusetts in a case in which it had determined the charter rights of the Royal Arcanum, a corporation organized under the laws of the state of Massachusetts. It was there correctly held that the Supreme Court of Massachusetts was the final arbiter as to the meaning and powers of a corporation chartered by a public statute of that state. This court correctly held that the decision of the Massachusetts Supreme Court was binding upon all of the states under the full faith and credit clause of the Constitution of the United States. No other decision could be reached in such case unless we are to have anarchy in the construction of statutes granting powers to corporations. In the present case, if the plaintiff in error is held to be concluded by the supreme courts of the various forty-eight states, at least two of which are absolutely contradictory to those of the others which have

passed upon the questions involved, its business will result in complete anarchy. A certificate of insurance held by a member in Texas will be held to mean one thing, and the certificate of another member, in exactly the same language, will be held in Indiana to mean the opposite. It is evident that in the Green case the Supreme Court of Massachusetts was given the right and the power to decide finally as to the construction and meaning of its own statute. It is just as plain that the supreme courts of the various states do not have the conclusive right to pass upon the statutes of a different jurisdiction. From the very nature of the case the federal courts are the ones which must pass upon the rights, duties, and powers of a corporation which is chartered by a public statute of the United States. Otherwise we would have forty-eight different constructions upon a single statute, none of which would be controlling outside of the state wherein it was decided. As the Supreme Court of Massachusetts is the final arbiter of the statutes of Massachusetts, by the same token, the Supreme Court of the United States must be the final arbiter of all the statutes of the United States. The question then arises, does the federal charter, granted to the plaintiff in error, to conduct a fraternal beneficiary society, give it power to raise its rates, when it is ascertained that it will result in the death of the society and the loss of insurance to every member holding a certificate. It has been held that in the absence of a reserved right to amend and alter the by-laws, a mutual benefit association has the inherent right to do so. *Supreme Lodge Knights of Pythias, v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409, *et auth.* It is not, however, necessary to base the plaintiff in error's claim upon an implied right. Section 4 of the charter (28 Stat. at L., 96, 97) provides: "That said corporation shall have a constitution and *shall have power to amend the same at pleasure*; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." Under the power so granted the plaintiff in error has the express power to change its rates, to make them conform to what the experience of the insurance world shows to be safe and necessary. The authorities for this proposition are collected at the end of point IV of this brief.

II.

The Honorable Court of Civil Appeals erred in determining that by the terms of the charter of plaintiff in error, it—Supreme Lodge, Knights of Pythias—obligated itself to perform the contract of insurance upon which Mims' suit was

predicated, which contract had been issued by an old corporation which had expired four years before the present corporation, plaintiff in error, was organized.

ARGUMENT.

It must be remembered that the language of the section of the charter relied upon by defendant in error reads as follows:

"Section 3. That all claims, accounts, debts, things in action, or other matters existing for or against the *present Supreme Lodge, Knights of Pythias*, mentioned in section '1' of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitation of time." (Printed record, p. 179.)

A fair construction of this language not only fails to support the contention of defendant in error, but actually disproves it. It will be remembered that there was an old fraternal Beneficiary Society, Knights of Pythias, created in the District of Columbia by the authority of the federal statute of 1870, and which expired by its own terms in 1890. From 1890 until 1894 an unincorporated association operated as the Supreme Lodge, Knights of Pythias. It was in existence at the date when the charter of the plaintiff in error was obtained. In other words, it was incorporated by an act of congress of which section 3 is a part. It provided that the corporation should assume the debts of the present Supreme Lodge, Knights of Pythias. It is only necessary to inquire what was the "present Supreme Lodge, Knights of Pythias." Did it mean the one then in existence—the unincorporated association—or did it mean the incorporated Supreme Lodge, Knights of Pythias, the charter to which had expired four years before? To ask the question is to answer it. If one should write "present Chief Justice of this Honorable Court" no one would suspect that the writer meant the former distinguished Chief Justice who has been dead for more than four years. If one should write of the present Governor of Texas, no one would suspect that he meant a man who was governor four years ago, and is now dead. If one should now write of the present occupant of the White House—the President of the United States—no one would suggest that it was a former occupant of the White

House who has not been there for four years. If a husband should make a will designating his present wife as a beneficiary, no one would suspect that he sought to name a former wife who had been dead for four years. But why multiply illustrations?

We repeat that the language of section 3 not only fails to assume the debts of the old corporation, but by its terms it excludes them. This conclusion will not be changed by a suggestion that if the unincorporated society assumed the obligations of the old corporation, the effect of this section would be to have the new corporation assume them likewise, because there is no evidence of any kind or character that the unincorporated society assumed the debts of the old corporation. If such assumption had never been made the defendant in error failed to offer any evidence of it.

III.

There was no evidence other than section 3 of the charter of plaintiff in error upon which the Honorable Court of Civil Appeals could have based its conclusion that plaintiff in error had assumed the obligation of the policy contract sued upon.

ARGUMENT.

To be sure there was evidence that plaintiff in error had collected premiums on the old policy from the defendant in error. To this we will call attention under another proposition. But the mere acceptance of dues or premiums by the plaintiff in error did not constitute an assumption of the contract or policy sued upon. This is well settled by the Supreme Court of Texas in the case of Eddy v. Hinnant, 82 Tex. 354, 18 S. W. 562. In the case cited the question arose as follows:

The East Line Railroad, a corporation in Texas, had entered into a contract with Hinnant giving him free passage over its railway as a part of the consideration for its right of way. The East Line sold its road to the Missouri, Kansas and Texas Railway Company. Hinnant sought to enforce his obligation against it as a succeeding owner of the corporation, and compel it to carry him free. In discussing that the Supreme Court used the following language:

“If it be admitted that the East Line Company sold and conveyed its railway and other property to the Missouri, Kansas and Texas Company, as far as it was in the power of the one to buy and of the other

to sell, yet in our opinion it does not follow that the plaintiff could recover in this case. The contract made by the brother with the East Line Company, in so far as it stipulated for a free passage for him, inured to his benefit, and under the rule of decision in this state he had a right of action for its breach against the company with whom it was made. But in order to show a right of action in the present case, *it was necessary for the plaintiff to prove not only that the Missouri, Kansas and Texas Company bought the East Line Railway, but also that it assumed the obligations of the East Line Company, or at least promises to perform the particular contract upon which the action in this case is based.* If A sell B a tract of land upon which a vendor's lien exists in favor of C, the land may be subjected to the payment of the debt; but B is not liable upon the contract for the purchase money, unless in his contract with A he has assumed to pay it, nor would any recognition of the promise of A to pay C the purchase money or any part payment upon it make him liable personally upon it. And so with the Missouri, Kansas and Texas Railway Company and its receivers in this case. They could respect *the contract of the East Line and Red River Railway Company as long as they desired*, but they were not bound to perform it. It is true that by the failure to perform they may have forfeited the title to the right of way and to the other property conveyed by B. C. Hinnant and his wife to the East Line Company; still, they were not responsible in damages for the failure to carry it out."

This was later approved in *Hutchinson v. International, &c., R. Co.*, (Tex.) 111 S. W. 1106.

Indeed, the Supreme Court of Texas could have rendered no other decision upon that question without ignoring the statutory enactments of the state which had been in existence for three-quarters of a century. In 1840 the Texas legislature enacted a statute which now constitutes Article 3356, Revised Civil Statutes of Texas, 1911. In so far as applicable, it reads as follows:

"Article 3965. (2543.) (2464.) Written Memorandum Required to Maintain Certain Actions. No action shall be brought in any of the courts in any of the following cases, unless the promise or agree-

ment upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized:
* * *

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another."

This constituted Article 2875 of what was known as Paschall's Digest, which is an old compilation of the statutes. It was carried forward in the Revised Statutes of 1879 as Article 2464, and in the Revised Code of 1895 as Article 2543.

It will be seen, therefore, that the plaintiff in error could not be charged with the debt of the old corporation unless the promise or agreement, or some memorandum thereof shall be in writing and signed by the party charged therewith, or by some person by him thereunto duly authorized. Unless section 3 of the statute in question constitutes such an assumption of the indebtedness there was none.

It will be seen, therefore, that the Honorable Court of Civil Appeals was obliged to base its decision upon this written assumption, or decide in favor of plaintiff in error. The harsh part of the decision of the Court of Civil Appeals consists in fact that they construed that section to be an assumption of the indebtedness, and yet they exempt the contract thus assumed from all control by the corporation. The court treats the contract as obligating plaintiff in error to pay the full amount of the policy therein mentioned, and yet denies to the plaintiff in error power under its charter to provide itself with funds to meet these obligations.

But if we are wrong in the above, and if plaintiff in error did by section 3 of its charter assume the obligation sued upon, then we submit upon that hypothesis the following proposition:

IV.

The policy sued upon and application therefor, the old policies for which it was substituted, the constitution and by-laws construed together, gave to the old Supreme Lodge the right to raise the rates in the event it should become necessary so to do.

ARGUMENT.

It will be noted that defendant in error applied for and obtained two certificates on the 30th of April, 1879, in the old corporation, one for one thousand dollars (\$1000) and the other for two thousand dollars (\$2000), the one being No.

5383 and the other No. 7869, each payable to his wife. Defendant in error in his application for these certificates, as well as the one sued upon, agreed to conform to and obey the laws, rules and regulations of the Order governing the Endowment Rank of the old corporation "*now in force or that may be hereafter enacted, or submit to the penalties therein contained.*" (Printed record, p. 173.) The certificates are precisely alike, except in amount. For that reason only one of them is here set out, No. 5383, which reads as follows:

"No. 5383.

CERTIFICATE OF MEMBERSHIP

ENDOWMENT RANK OF THE ORDER OF KNIGHTS OF
PYTHIAS.

This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in section No. 278 and is a member in good standing in said Rank. And in consideration of the *representations and declarations* made in his application bearing date of April 11, 1879, which *application* is made a part of *this contract*, and the payment of the prescribed admission fee; and in consideration of the *payment hereafter to said Endowment Rank of all assessments as required*, and the full compliance with *all the laws governing the Rank, now in force, or that may hereafter be enacted*, and shall be in good *standing* under said laws, the sum of one thousand dollars (\$1,000) will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master Exchequer, upon due notice and proof of death, and good standing in the Rank at the time of death, and the surrender of this certificate. Provided, however, that if at the time of the death of the said Brother S. Mims, Jr., there shall be less than one thousand members in this class, there shall only be paid a sum equal to one dollar (\$1) for each member in good standing in this class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force

governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

In witness Whereof, We have hereunto subscribed our names and annexed the seal of the Supreme Lodge, Knights of Pythias of the World.

(Signed) D. B. WOODRUFF,
Supreme Chancellor.

JOSEPH DOWDALL,
Supreme Keeper of Records.

Issued this the 30th day of April, 1879, P. P. XVI,
at Indianapolis, Indiana, and registered in Book 1,
Folio 132.

(Signed) JOHN B. STUMPH,
Supreme Master of Exchequer."

(Printed record, p. 96.)

On May 7, 1885, the defendant in error applied for the certificate sued on in lieu of the other two. His applications for the change were like the old certificate, identical except in number, and made on the same day. (See bottom of p. 97, and top of p. 98, printed record.) A new certificate for three thousand dollars (\$3000) was issued to him on the 29th of May, 1885. It reads as follows, to wit:

"CERTIFICATE OF MEMBERSHIP."

No. 4183.

Fourth Class. \$3000

ENDOWMENT—OF THE ORDER OF KNIGHTS OF
PYTHIAS.

This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in *consideration of the representations and declarations made in his Application, bearing date of April 11, 1879, and his absolute surrender of the certificates heretofore held by him in first and second classes for cancelation, as requested in his application for transfer to the fourth class, bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and*

the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars (\$3000) will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, wife, as directed by said Brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon due notice and proof of death, and good standing in the Rank at the time of the death and surrender of this certificate.

Provided, however, that if at the time of the death of said Brother, one monthly payment to the endowment fund by members holding an equal amount of endowment shall not be sufficient to pay the amount of endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the endowment fund by each member holding equal amount of endowment. And it is understood and agreed that *any violation of the within-mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate and all claims null and void*, and that the said Supreme Lodge shall not be *liable for the above sum or any part thereof*.

In Witness Whereof, We have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World.

(Signed) JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest:

R. E. COWAN,
Supreme Keeper of Records and Seal.

Issued this 29th day of May, 1885, P. P. XXII,
at Washington, District of Columbia, and registered
in Book 1, Folio 84.

(Signed) HALVOR NELSON,
Supreme Secretary."

(Printed record, pp. 98, 99.)

At the date of the issuance of the new certificate the charter of the old corporation contained the following provision:

"9. And be it further known, That the said Su-

preme Lodge shall have power to alter and amend its constitution and by-laws at will." (Printed record, p. 93.)

In 1880 the old corporation adopted, among others, the following by-laws:

"ARTICLE V.

Section 5. The power to adopt any additional forms, change, alter or amend any of the secret work, laws, or the business details connected therewith, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the Rank in detail and require of all the sections a strict conformity therewith.

ARTICLE VI.

Section 4. These laws may be altered or amended at any regular session of the Supreme Lodge, K. of P." (Printed record, p. 149.)

Under the head of "Powers of the Supreme Lodge," the Supreme Lodge in 1884 adopted the following provisions:

"ARTICLE V.

Section 4. If after paying a benefit, there remain in the fund belonging to the class of which the deceased was a member, a less sum than is sufficient to pay a benefit in that class, the supreme secretary shall immediately notify the secretary of each section to collect and forward to him an assessment of one dollar and ten cents (\$1.10) from each member of said class, which must be paid within thirty days.

ARTICLE VII.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias, by a two-thirds vote." (Printed record, p. 150.)

In 1886, at its annual session at Toronto, Ontario, it passed, among others, a law providing rules for medical examiners, the applications for certificates of membership, and forms of certificates of membership, and further provided as follows:

"ARTICLE V.

Section 5. The power to adopt any additional forms, alter or amend *any of the laws* or the business details connected with the Endowment Rank, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the rank in detail, and to require on the part of all sections a strict conformity therewith.

ARTICLE VI.

Section 1. The funds of the Endowment Rank shall be as follows:

The endowment fund, which shall be derived from all the monthly assessments and from the special assessments when necessary.

Section 3. *Assessments may be ordered by the board of control whenever required by the necessities of the Endowment Rank.*" (Printed record, pp. 152, 153.)

At the same time they further amended their laws as follows:

"ARTICLE XI.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge of Knights of Pythias of the World, by a two-thirds vote." (Printed record, p. 153.)

Then in 1888 the old corporation amended its by-laws as follows, under the head "Powers of the Supreme Lodge":

"Section 1. It possesses the power, in accordance with the laws of the Order, to establish the Endowment Rank.

Section 6. To create, hold and disburse through a board of control, the funds of the Endowment Rank, under such regulations as it may deem necessary." (Printed record, p. 153.)

It then prescribed, among other things, the form of application for membership, and the form of the certificate to be issued to the members. (Printed record, pp. 153, 154, 155.)

In addition thereto it amended Art. IV and made it read as follows, to wit:

"ARTICLE IV.

Monthly Assessments and Forfeiture of Certificate
of Endowment.

Section 1. Each member of the Endowment Rank shall, on presenting himself for obligation, pay to the secretary of the section, in accordance with his age and the amount of endowment applied for, a monthly assessment, as provided for in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank; unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World. (Omitting table of monthly payments.)

Section 2. If at the time of the death of a member, the number of the members of said rank shall not be sufficient to pay in full the maximum amount of endowment held under the certificate of said deceased member, then there shall be paid to the beneficiary an amount equal to the proceeds of one full assessment made upon all the remaining members of the said Endowment Rank, less ten per cent., for expenses, and the payment of such sum to the beneficiary shall be in full of all claims and demands under and by virtue of said certificate." (Printed record, pp. 155, 156.)

ARTICLE VI.

Section 1. The funds of the Endowment Rank shall be placed to the credit of the Endowment Rank, which shall be derived from all assessments; from the membership fees; certificate fees; clearance card fees, from the sale of supplies and from all other sources of revenue.

Section 3. Special assessments may be made upon all members of the Endowment Rank by the board of control, when necessary to meet the liabilities of the Rank.

ARTICLE VII.

Section 5. The board shall have entire charge and full control of the Endowment Rank, subject to such restrictions as the Supreme Lodge may, from time to time, provide.

Section 9. The board is hereby authorized to enact general laws, rules and regulations in conformity with this constitution for the government of sections and the membership of the Endowment Rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action.

Section 17. The board is hereby empowered and directed to rerate the members transferred from the first, second and third classes under resolutions passed by the Supreme Lodge at the session of 1884 permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third classes. The board is instructed to rerate this class of membership so as to require them to hereafter pay as of their age when becoming members of the fourth class, said rerating to take effect at such date as the board shall prescribe on and after the 1st day of August, 1888; and the board is further empowered to rerate the present table of the fourth class, applying it to all members, should such action become necessary for the proper protection and perpetuity of the rank." (Printed record, pp. 156, 157.)

On March 1, 1894, and before the incorporation of plaintiff in error, the rates were increased five cents per \$1,000. (Printed record, p. 126.) On September 1, 1901, the National fraternal rates were adopted, changing the old rates. (Printed record, pp. 126, 127.) In addition to that seven special assessments were made before the raise in rates in 1910, the first, July, 1892, two years before the incorporation of plaintiff in error; the others May, 1901, February, 1909, September, 1909, March, 1910, May, 1910, and July, 1910.

The defendant in error testified on the trial of the cause in the trial court, as follows:

"I joined this fraternal organization for the purpose of insuring my life for the benefit of Mrs. Mims, and also for the purpose of helping other Knights of Pythias. I presumed that the organization was not for profit, but for the protection of the individual members constituting the insurance circle. I supposed that the only source of revenue to meet my policy and other policies issued by the insurance department would be obtained from assessments on

those insured, and I also presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew *that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase.* I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be *less per head on those five thousand members than it would be when the ranks had been reduced to two thousand.* As the membership decreased the death rate *increased and they would be obliged to increase the assessments* if they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance scheme was based on the assessment plan.

If you reduced the membership to two thousand and the death rate increased as they grew older, *you certainly would have to increase that rate if you met the obligations.* I do not remember whether they raised the rates on me in 1888 and 1901. They raised them so often that I can not remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise, when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910, when I declined to pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonged to the lodge and my dues are paid up now. I belong to the Red Cross Lodge at Ft. Worth." (Printed record, p. 120, p. 121, down to Redirect Examination.)

Under the facts above stated the correctness of our Fourth Proposition to the effect that the policy sued upon and the application therefor, the old policies for which it was substituted and the applications therefor, the charter and by-laws properly construed gave to the old Supreme Lodge the right to increase the rates in the event it should become necessary so to do, should be conceded.

AUTHORITIES.

- Union Pac. R. Co. v. Myers, 115 U. S. 1, 25,
 29 L. ed. 319;
 Messer v. Ancient Order United Workmen, 180
 Mass. 321, 62 N. E. 252;
 Wineland v. Knights of the Maccabees, 148 Mich.
 608, 112 N. W. 696;
 Williams v. Supreme Council, C. M. B. A., 152
 Mich. 1, 115 N. W. 1060;
 Reynolds v. Supreme Council Royal Arcanum,
 192 Mass. 150, 78 N. E. 129, 7 L. R. A.
 (N. S.) 1154;
 Supreme Lodge Knights of Pythias v. Knight,
 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409;
 Barbot v. Mutual Reserve Fund Life Assn., 100
 Ga. 681, 28 S. E. 498;
 Mutual Reserve Fund Life Assn. v. Taylor, 99
 Va. 208, 39 S. E. 854;
 Richmond v. Supreme Lodge Order of Mutual
 Protection, 100 Mo. App. 8, 71 S. E. 736;
 Miller v. National Council K. & L. of S., 69
 Kans. 234, 76 Pac. 830;
 Woodmen of the World v. Woods, 34 Colo. 1,
 81 Pac. 261;
 Shepperd v. Bankers' Union of the World, 77
 Nebr. 85, 108 N. W. 188;
 Conner v. Supreme Commandery Golden Cross,
 117 Tenn. 549, 97 S. W. 306;
 Champion v. Hannahan, 138 Ill. App. 387;
 Pierce v. Bankers' Union of the World, 140 Ill.
 App. 495;
 Mock v. Supreme Council Royal Arcanum, 121
 App. Div. (N. Y.) 474;
 Fullenwider v. Supreme Council Royal League,
 73 Ill. App. 321, 331;
 Fullenwider v. Supreme Council Royal League,
 180 Ill. 621, 54 N. E. 485, 72 Am. Rep. 239;
 Jones v. Knights of Maccabees, — Wash. —
 (decided June, 1915);
 Bartrum v. Supreme Council Royal Arcanum, 6
 Ont. W. R. 404;
 Haydel v. Mutual Reserve Fund Life Assn., 98
 Fed. 200;
 Haydel v. Mutual Reserve Fund Life Assn., 104
 Fed. 718.

V.

The foregoing statement shows that the defendant in error is now estopped from denying the right of plaintiff in error to increase the rates as it did in 1910, if necessary, because he had acquiesced in that right and concurred with the old corporation in the fact that it had such power.

AUTHORITIES.

Wineland v. Knights of the Maccabees, 148 Mich. 608, 112 N. W. 696;
Gibbs v. Supreme Lodge, Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11;
Manning v. San Antonio Club, 63 Tex. 166;
29 Cyc. 70.

ARGUMENT.

At the risk of being tedious we again respectfully call the court's attention to the fact that the original certificates issued to S. Mims provided in express terms that they were issued in consideration of the payment thereafter to the Endowment Rank of all assessments as required, and a full compliance with all the laws governing the Rank then in force or that might thereafter be enacted, and the charter of the old corporation issuing those certificates, at that date authorized the change of the by-laws at will.

It must also be borne in mind that the certificate sued on contained a similar provision, though stronger, to the effect that it was issued, among other things, "in consideration of the payment hereafter to said Endowment Rank of all monthly payments, and a full compliance with all the laws governing this Rank now in force or that may hereafter be enacted." To this must be added his own personal statement while on the witness stand to the effect that when taking this insurance he knew that unless the membership was kept up to the then standard, and unless the death rate did not increase, the assessments must necessarily increase.

He added:

"If you reduced the membership to two thousand and the death rate increased as they grew older, you certainly would have to increase that rate if you meet the obligations. I do not remember whether they raised the rates on me in 1888 and 1901. They raised them so often that I can not remember the

dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910." (Printed record, p. 121.)

To this must be added the declaration of the old corporation in 1888, in Art. VII, Sec. 17:

"Section 17. The board are hereby empowered and directed to rerate the members transferred from the first, second and third classes under resolution passed by the Supreme Lodge at the session of 1884, (which was the one under which he obtained the certificate sued on) permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third classes. The board is instructed to rerate this class of membership so as to require them to hereafter pay as of their age when becoming members, etc." (Printed record, pp. 156, 157.)

Section 9 of Art. VII, passed at the same date, provides as follows:

"Section 9. The board is hereby authorized to enact general laws, rules and regulations in conformity with this constitution for the government of sections and the membership of the Endowment Rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action." (Printed record, p. 156.)

It would seem, therefore, that by contemporaneous construction it was conceded on both sides that the Supreme Lodge and the board of control had the right to increase the rates whenever necessity required. It must, therefore, follow that if the plaintiff in error assumed the contract of the old corporation it assumed it with the interpretation placed on it by both parties thereto, to wit, that if it became necessary in order to carry out the contract for it to increase the rates charged for insurance, it would have that authority. The Honorable Court of Civil Appeals should have held that the plaintiff in error was without power to assume the indebtedness sued on except on the basis that the defendant in error on becoming one of its members subordinated himself to its

laws. It is a well settled rule that when an old corporation issues a policy or a contract, and a new corporation is organized and receives the dues on the old certificates issued by its predecessor, the obligation thus existing by reason of the dues received must be measured and the liabilities must be fixed by the laws of the new corporation.

AUTHORITIES.

- Bollman v. Supreme Lodge, Knights of Honor, (Tex.) 53 S. W. 722—a case in which a writ of error was refused by the Supreme Court. (See 54 S. W. 246);
 Wineland v. Knights of the Maccabees, 148 Mich. 608, 112 N. W. 696;
 Gibbs v. Supreme Lodge, Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11.

ARGUMENT.

It follows, therefore, that any liability under the certificate sued on must be treated as if it were a liability under a certificate issued by the new corporation, and limited and controlled by the new corporation's charter and by-laws.

AUTHORITIES.

- Watson v. National L., &c. Co., 189 Fed. 872;
 Niblack Benefit Society and Accident Ins. (2d ed.) 33, 34, § 18;
 29 Cyc. 70.

ARGUMENT.

The charter of the new corporation and by the by-laws under which it acted gave it full power to increase the rates whenever it became necessary so to do. The language of the charter of the plaintiff in error conferring the right to amend its by-laws reads as follows:

"Section 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." (Printed record, p. 95.)

It contained the further provision:

“Section 5. That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.” (Printed record, p. 95.)

It was proved that the new corporation got no funds or any property from the old corporation, or from the unincorporated society. (Printed record, p. 162.) That it got nothing from the old corporation is not directly stated in the testimony, but it is clearly inferred. The witness, Powers, does state emphatically that plaintiff in error got nothing from the unincorporated society, which succeeded the old corporation. We, therefore, submit that it got nothing from the old corporation.

We submit that the judgment of the Court of Civil Appeals brought here for review is a most unrighteous one. It in effect holds plaintiff in error responsible for a contract made by an old corporation and the defendant in error. The contract and all the preliminary acts leading up to it, the charter, by-laws of the old corporation, the language of the application of the defendant in error for the certificate, and the then opinion of the defendant in error as shown by his own testimony all agreed that the old corporation had the right to increase its rates, if necessary—and that it would probably be necessary to increase them. This was acted upon, and the rates were increased from time to time, and they were paid by the defendant in error. If the plaintiff in error assumed that contract, it assumed it with the construction which the parties thereto had placed upon it. Later the record discloses that the plaintiff in error increased its rates, and the defendant in error testifies that he paid them all up until 1910. They were again increased because it was found necessary, and as to this fact there is no dispute. They were obliged to increase the rates or else refuse to pay the amount of the certificates. The rates were increased. The defendant in error repudiates all of his promises in his application for insurance, repudiates the language of his certificates that he would pay all the dues and monthly assessments required, and repudiates his construction of the contract of the old corporation, and proceeded to sue plaintiff in error—a fraternal organization doing business and making no profit—for all the money that he had paid into the treasury. He lost sight of the principle enunciated by this court in the Korn case, 6 Cranch. 192, that his relations to this organization are dual; that he was the insurer of each of his brother Knights of Pythias, as they were in-

surers of him; and that the greater part of the moneys that he had paid into the treasury of the Order of the Supreme Lodge, Knights of Pythias, had been distributed in the payment of death benefits which he was obligated to pay as much as any member of the Knights of Pythias. But notwithstanding that fact the courts of last resort in Texas have held that he can recover from the Order all of the moneys that he has paid into the treasury and that have been distributed on obligations of his own creation. The injustice of this is apparent. It means that if one thousand young men in the prime of life should enter into a mutual obligation to insure each other's lives for three thousand dollars (\$3000) each, and that when a member dies the one thousand members would assess themselves practically three dollars (\$3) each to pay that policy. They would know when they entered into this obligation that if an epidemic should sweep away half of their number, they must double their assessments. They entered into the agreement with the full knowledge of that fact, just as Mims did when he entered into this contract. But suppose these one thousand men continue their organization? From time to time a member dies, and his place is taken by a new member, the membership always being kept to one thousand. But suddenly an epidemic of yellow fever sweeps five hundred of them into eternity. The other five hundred have to pay these death losses. It is manifest that they must increase their rates, or not pay the beneficiaries the full three thousand dollars (\$3000). They do increase the rates for that purpose. One hundred of the remaining five hundred rebel. They say they do not indorse this increased rate, though they knew when they joined that the increase would probably be necessary. They gave to the lodge repeatedly over and over power to change its laws; they not only did that but they voluntarily agreed to change the rates from time to time, but that they will not now permit any other changes. Not only do they object, but they bring suit against the organization for every cent that has been heretofore paid out to families of deceased members on an obligation created by themselves. They expect the court to give them a judgment for the amount of these dues thus paid, with interest thereon from the dates of payment. All because what? Because the organization has done what they felt sure it would probably be obliged to do at the date when they became parties to the contracts which it had made. Surely, that can not be the law. It is the essence of unfairness, as the authorities heretofore cited conclusively demonstrate.

But if this were a case of first impression we submit that the facts are not susceptible of any other construction than that the old corporation and the new were authorized to increase the rates to such amount as should be necessary to meet the obligations when due. What could be the meaning of the language, "I agree to conform to and obey the laws, *rules and regulations of the Order governing the Endowment Rank* 'now in force or that may hereafter be enacted, or submit to the penalties therein contained' "? It must be remembered that the Endowment Rank is the insurance part of the Order. That was recognized by the defendant in error. On p. 121 of the printed record may be found a part of his redirect examination. In this he says:

"I have remained a social member and am a member now, keeping my dues paid all the while."

The obligation then to obey the laws, rules and regulations of this Rank was not simply to obey the by-laws of the social order, but to obey the laws in relation to the Uniform Rank or Insurance Department. The Uniform Rank was an entirely different organization consisting of members of the other organization.

Article I, section 1, says:

"A section of the Endowment Rank shall consist of not less than seven members who are in good standing. It shall be known as Section No. — of the Endowment Rank, of the Knights of Pythias." (Printed record, p. 109.)

Article III, section 1, says:

"No person shall be eligible for membership in this Rank unless he be a Knight of Pythias in good and regular standing in his lodge, and not over fifty years of age: Provided, until June 1, 1878, all members of the Knights of Pythias may become members of the Endowment Rank without regard to age, provided they possess the other required qualifications." (Printed record, p. 110.)

"Section 2. Applications for membership must be accompanied by a certificate from the Lodge to which the applicant belongs, that he is not in arrears for dues, and a medical certificate from the physician, designated by the section, to which the application is made. A fee of three dollars (\$3) must accompany the application." (Printed record, p. 110.)

The succeeding portions provide that if he sever his connection with the Lodge of the Knights of Pythias, he also severs his connection with the Uniform Rank. (Printed record, pp. 110, 111.)

When a member joined the Uniform Rank, and obligated himself to obey all of its rules, laws and regulations theretofore passed, or should be thereafter passed governing that Rank, he meant that he was to obey all the rules, laws and regulations passed governing the insurance department. This necessarily meant that he agreed that the rates should be readjusted, if necessary. The certificates as issued to him contained this statement:

"This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of the Knights of Pythias in Section No. 278 and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application bearing date of April 11, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee; *and in consideration of the payment hereafter to said Endowment Rank of all assessments as required*, and the full compliance with all the laws governing the Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of one thousand dollars (\$1000)." (Printed record, p. 96.)

The certificate issued in lieu of the two last mentioned, on the 29th of May, 1885, contains this statement, among others:

"This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing date of April 11, 1879, and his absolute surrender of the certificates heretofore held by him in first and second classes for cancelation, as requested in his application for transfer to the fourth class bearing date of May 7, 1885, all of which is made a part of this contract, *and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required*, and the full compliance with *all the laws*

governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing, under said laws, etc." (Printed record, pp. 98, 99.)

What could be the meaning of his agreement to pay all monthly payments as required? Could it mean anything other than that he would make the payments assessed by the Uniform Rank of the Knights of Pythias? What is the meaning of the language, "that he should fully comply with all the laws *governing this Rank now in force, or that may hereafter be enacted*", if it were not intended to confer the power to pass any laws necessary to preserve the integrity of the certificates issued and to secure their payment?

We repeat that if no legal construction of these instruments had ever been had this language is of itself enough to bind him to pay whatever assessments were necessary to enable the Endowment Rank to meet its obligations.

Last of all, what was his understanding of the language of his application and the language of the certificates issued to him? He has answered that from the witness stand under oath. This is the way he answered it:

"I presume that the organization was not for profit, but for the protection of the individual members constituting the insurance circle. I suppose that the *only source of revenue* to meet my policy and other policies issued by the insurance department would be obtained from assessments on those insured. I also presume that if I realized on my policy the assessments would have to be sufficient to meet the death claims on the death of the membership. I knew *that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase*. I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be less per head on those five thousand members than it would be when the ranks had been reduced to two thousand. As the membership decreased the death rate increased and they would be obliged to increase the assessments. If they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance

scheme was based on the assessment plan." (Printed record, pp. 120, 121.)

In view of this language, we beg to suggest to this court that the contract sued upon, the application therefor, and the two for which it was substituted, independent of any other consideration, gave to the Uniform Rank of the Knights of Pythias the right to increase the premiums or assessments whenever necessary to enable the plaintiff in error to meet its obligations; that this was so understood by the plaintiff in error at the time, and was understood by the defendant in error, as he has under oath admitted; that this common understanding of the parties was acted upon repeatedly—the assessments were increased by the plaintiff in error and paid by the defendant in error.

We submit, therefore, that the judgment of the Honorable Court of Civil Appeals should be reversed and here rendered in favor of plaintiff in error and against defendant in error, for all of which it prays.

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Attorneys for plaintiff in error,
Supreme Lodge, Knights of Pythias.

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.....,

Of Counsel.

ILLUSTRATION II.

Reconstructed Appeal Brief.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 808.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

v.

S. MIMS,
Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

PRELIMINARY STATEMENT.

The above entitled action was brought by S. Mims, defendant in error, upon a breach of insurance contract against the Supreme Lodge, Knights of Pythias, an order incorporated under a federal statute and plaintiff in error, in the District Court of Dallas County, Texas, on May 19, 1911, resulting in a verdict for the plaintiff, was then appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of the state of Texas, where it was affirmed and later modified as to the amount of damages, whereupon application was made to the Supreme Court of Texas for a writ of error to review the judgment of the lower court, but, upon a refusal of the writ, application was then made to the Honorable Anson Rainey, Chief Justice of the Honorable Court of Civil Appeals for the Fifth Judicial District,

for a writ of error, which, having been granted, the case was brought to this court.

STATEMENT OF FACT.

SUBSTANCE OF THE COMPLAINT.

1. Defendant in error alleged that plaintiff in error was a corporation organized under the laws of some state other than Texas, and engaged in the life insurance business.

2. Alleged that it had issued to him a policy in 1879, and that thereafter, on May 29, 1885, had exchanged it for one for three thousand dollars (\$3,000), issued to his wife as beneficiary. (Printed record, p. 1.)

AMENDED COMPLAINT.

On February 14, 1913, plaintiff filed an amended petition in lieu of his original petition, in which he materially changed his allegations.

1. He then alleged that in the year 1870 there was incorporated under a general law enacted by the Congress of the United States a certain insurance order or company, the "Supreme Lodge, Knights of Pythias", otherwise known and frequently denominated thereafter as "Supreme Lodge, Knights of Pythias of the World".

2. Alleged that by the express terms of the general law of the congress under which said corporation was incorporated, the life of said corporation expired in the year 1890.

3. Alleged that said company continued after its incorporation down to the time of its death by law, or expiration of its charter in said year 1890, to engage in the business of life insurance, issuing policies of insurance upon the lives of persons; that on April 11, 1879, plaintiff obtained from said company a written policy of insurance or benefit certificate insuring plaintiff's life in favor of a beneficiary or beneficiaries therein named.

4. Alleged that afterward, on May 29, 1885, said corporation so issuing said policy issued and delivered to plaintiff in lieu of said former insurance policy another written policy of insurance or benefit certificate, wherein and whereby it obligated itself to pay to plaintiff's wife, Mary J. Mims, the sum of three thousand dollars (\$3,000) upon notice and proof of plaintiff's death in good standing at the time of his death in what was denominated and known

as the "Endowment Rank" of said corporation, said benefit certificate further stipulating and providing that if, at plaintiff's death, one monthly payment to the endowment fund by members holding an equal amount of endowment (meaning an equal amount of endowment to that of plaintiff) should not be sufficient to pay the amount of endowment held by plaintiff (meaning his \$3,000), that the benefit to be paid upon such insurance policy in case of plaintiff's death should be a sum equal to one payment to the said endowment fund by each member holding an equal amount of endowment.

5. Alleged that plaintiff continued carrying his said policies with said company until the expiration of its existence by terms of law, as aforesaid, whereupon the officials in charge of the affairs of said company at its decease, and their successors, continued thereafter for a period of several years, and until the incorporation of the defendant herein in the year 1894, to take and acquire and remain in possession of the assets of said deceased company, and to continue and carry on as formerly its business as an unincorporated association, but still under the name "Supreme Lodge, Knights of Pythias", or "Supreme Lodge, Knights of Pythias of the World".

6. Alleged that thereupon, and thereafter, and in the year 1894, the defendant herein, the "Supreme Lodge, Knights of Pythias", was incorporated under a special act of the Congress of the United States, since which time said defendant has continued to be, and is now a corporation duly incorporated and engaged in the business of life insurance, issuing policies of insurance upon the lives of persons.

7. Alleged that by the express terms and conditions of the charter of the defendant company it was provided and stipulated that

"all claims, accounts, debts, things in action, or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section one of this act, shall survive and succeed to and against the body, corporate and politic, hereby created,"

whereby it was expressly stipulated and provided that the defendant in accepting its charter should undertake and obligate itself in all respects to carry out the terms of all insurance policies of the former corporation aforesaid, or of said unincorporated association.

8. Furthermore, plaintiff avers, and shows the fact to be, that the defendant at all times since its incorporation, has accepted dues, payments and premiums from the plaintiff, and in all respects bound itself in law and in fact, to carry out plaintiff's said contracts of insurance. The defendant acquired and took over all the assets of said former corporation and of said unincorporated association.

9. Alleges that at all times plaintiff was and remained a member in good standing of the Endowment Rank of said corporation which issued said policies, and in all respects continued and remained in good standing in both of the corporations and unincorporated association mentioned herein, and continued at all times to carry out and comply with all the terms and conditions of this insurance aforesaid, and desired and expected to continue to do so.

10. Alleges that notwithstanding which fact the defendant herein, while plaintiff's said insurance was in full force and effect, did on or about August 2, 1910, through its Supreme Lodge, being its supreme governing body, wrongfully and illegally passed and promulgated and put into force, certain pretended laws or amended laws, wherein and whereby the defendant demanded and required of plaintiff that plaintiff should, beginning with the month of January, 1911, pay the defendant the large sum of thirty-four dollars and eighty cents (\$34.80) monthly dues and assessments, as a condition precedent to the recognition and maintenance of plaintiff's insurance with defendant, whereas theretofore defendant was requiring of plaintiff the payment of only seven dollars and thirty-five cents (\$7.35) dues and assessments, per month, as a condition precedent to the recognition and maintenance of said policies.

11. Alleges that defendant was certainly not authorized in law to exact more than said last mentioned sum, and not even that amount, as it was a part and condition of plaintiff's contracts of insurance as aforesaid, that the monthly rate of assessment to be paid by plaintiff should never at any time exceed the amount of, to wit, three dollars and sixty cents (\$3.60) per month, by virtue of the fact that there was established in the year 1884 what was known and denominated as the fourth class of the Endowment Rank of said first incorporated company, as aforesaid, and it was expressly provided by the constitution or by-laws of said company, which provisions became and were a part of plaintiff's contracts of insurance aforesaid, that the Endowment Rank, for the payment of benefits in said fourth class

should be derived from monthly payments by each member (of which plaintiff was one), said payments to be for each one thousand dollars (\$1,000) of endowment, and to be graded according to the age of the member at the time of making application (meaning his application for membership in said Endowment Rank) and his expectancy of life, the age to be taken at the nearest anniversary of his birthday; that the monthly payments should be based upon the average expectance of life of the applicant, and should continue the same so long as his membership continued, by reason of the monthly assessment rate to be paid by plaintiff upon his said three thousand dollars (\$3,000) of insurance was expressly limited and agreed never to exceed said sum of, to wit, three dollars and sixty cents (\$3.60) per month.

12. Alleges that defendant not only passed and demanded, as aforesaid, in the year 1910, an illegal raise in rates against plaintiff, as aforesaid, but it further then and there breached plaintiff's contracts with it, as aforesaid, in that, in passing said laws or pretended laws, it expressly declared and announced that the Supreme Lodge of the defendant should have the right to change, increase or adjust the schedule of rates in the fourth class of defendant (in which plaintiff with his insurance aforesaid was) and which attempt to reserve said right in said Supreme Lodge was illegal, unauthorized, and a further breach and repudiation of plaintiff's said contracts of insurance with defendant.

13. Alleges that not only so, but in so attempting to pass said laws of 1910, the defendant further breached its contract of insurance with plaintiff, in that it then and there undertook to provide and declare that members of its fourth class should have no divisible interest in the funds or properties of the insurance department of the defendant, nor be entitled to any apportionment or application of the same, which was a further breach and repudiation of plaintiff's contracts of insurance. (Printed record, pp. 5, 6 and 7.)

These allegations were followed by appropriate allegations of the forfeiture by this defendant of the policy on account of the fact that defendant in error refused to pay the increased rates. He also prayed for the recovery of all premiums paid to the old corporation, the unincorporated society, and the defendant, with interest thereon from date of payment.

AMENDED ANSWER.

On March 1, 1913, defendant, plaintiff in error here, filed its amended answer, joining issue with the plaintiff on all the allegations in the amended original petition except such as were therein specially admitted. Its answer in part was as follows:

1. Plaintiff in answer denies:

“For further and special answer to plaintiff’s petition, defendant denies that it ever issued or executed or became responsible for the certificate sued on in this case by the plaintiff.” (Printed record, p. 17, subdivision (7), first three lines.)

2. Again defendant specially denies that it ever in any manner, in writing or otherwise, assumed the payment of the certificate sued on in this case, as alleged in plaintiff’s petition, or has ever obligated itself in any way, binding under the law, to carry out the alleged contract made between the plaintiff and the old corporation as evidenced by the certificate alleged to have been issued or assumed by the unincorporated society and sued on in this case. (Printed record, p. 22.)

The section of the charter of plaintiff in error relied on by the defendant in error as an assumption of the certificate sued on is section 3, which reads as follows:

“That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section 1, of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time.”

3. Plaintiff in error also denied that it had ever received any of the assets of the old corporation or of the unincorporated society.

4. Plaintiff in error affirmatively insisted that the assumption of the obligations of the “present” Supreme Lodge, Knights of Pythias, mentioned in that section meant the unincorporated society, and not the old corporation which

had expired four years before the incorporation of defendant, plaintiff in error here.

5. Plaintiff in error pleaded as to the authority of plaintiff in error to raise the assessments or increase the rates charged, plaintiff in error here, defendant there, pleaded among other things the following:

"Defendant admits that it passed the laws hereto attached and marked "Exhibit B", at the August, 1910, convention of its Supreme Lodge, but defendant avers that said laws were just, reasonable and necessary; that it had the authority and power to pass same, and that said laws, by reason of the facts stated in answer and by reason of the further facts hereinafter stated, were binding and obligatory upon plaintiff, and defendant avers that plaintiff's failure to comply with said laws operated as a forfeiture of any rights plaintiff had under his certificate of insurance sued on in this case." (Printed record, p. 26.)

6. Plaintiff in error avers that defendant's rights and any claim of plaintiff are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank of the insurance department of this defendant, and the amendments thereto adopted by this defendant, and that any obligation of this defendant to the said plaintiff under the certificate alleged to have been issued to him in this case and sued on herein, are governed by the character of this defendant, its laws, rules, and regulations governing the rights of the members of the order of the Supreme Lodge, Knights of Pythias, or amendments thereto adopted by this defendant.

7. Defendant alleges that under the constitution, laws, rules and regulations of this defendant, under which it was acting at the time it was incorporated, and under which it has acted since its organization as a corporation, the right was and is expressly given the defendant to increase its rates of assessments, and the rates of assessments levied as expressly stipulated in its laws to be in force and effect so long as a member remained a member of the Endowment Rank or insurance department of this defendant, unless otherwise provided for by the Supreme Lodge or board of control of the Endowment Rank of the Knights of Pythias. In other words, that by the charter, laws and regulations adopted by this defendant since its incorporation and under

which it was acting when it became incorporated, and under which the said unincorporated society was acting at the time plaintiff became a member and at the time this defendant was incorporated, the express right was given and retained by said unincorporated society, and by this defendant, all of which were acquiesced in and ratified by the plaintiff, to increase rates of assessments on any certificate issued by this defendant or by said unincorporated society, or for which this defendant or said unincorporated society might in any way become responsible for the payment of, either express or implied. (Printed record, pp. 21, 22.)

8. Defendant further avers that the charter of said corporation known as The Supreme Lodge of the Knights of Pythias of the World, expired by limitation on or about May 5, 1890.

9. Defendant also avers that from said date up to about June 29, 1894, no corporation existed, but a society known as The Supreme Lodge of the Knights of Pythias acted as a fraternal insurance company without any charter and without being a corporation until on or about June 29, 1894. That under the laws existing when said unincorporated society began acting as a fraternal insurance company, and under which laws said unincorporated society acted and by which it was governed, and under the laws adopted by said unincorporated society during its existence, express power was given to, and existed in, said unincorporated society and its supreme governing body to change and amend its laws and to change and raise the rates of assessments.

10. Defendant avers also that in the year of 1894 this defendant, The Supreme Lodge, Knights of Pythias, was incorporated as above alleged, by an act of congress approved by the President, June 29, 1894. That subsequently, in the year of 1900, said act of incorporation of this defendant was amended, and that subsequently in 1907 said act of said incorporation was further amended by the Congress of the United States and that this defendant has been acting under said acts of incorporation and amendments thereto since said date of its incorporation.

11. Defendant again avers that under the acts of incorporation of this defendant and amendments thereto, express power was given to change and amend its by-laws, rules and regulations and that such rights were also given and clearly set forth and defined in the constitution, laws

and regulations of the supreme governing body of this defendant. (Printed record, p. 20.)

The section of the charter upon which defendant based its right to raise the rates reads as follows:

"Section 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State."

Section 5 fixes the character of insurance which it should conduct. It reads as follows:

"That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent."

12. Defendant averred that if it ever received any dues and assessments from defendant in error it was under the following circumstances:

"If it did receive such dues, assessments or payments, * * * it did so upon obligation both expressed and implied upon the part of the plaintiff that he would comply with the laws in force, existing, and subsequent to, the time this defendant was incorporated as aforesaid, whether those laws were the laws adopted by the unincorporated society or by this defendant. That plaintiff, before and since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws, and under which it operated at the date of its incorporation, and adopted by it from time to time, or with notice thereof, expressed or implied. That frequently since this defendant became a corporation, the plaintiff dealt with it as such in paying assessments upon certificate or certificates issued to plaintiff by either the former corporation or said unincorporated society, this defendant increased and changed the rates of assessments and levied higher rates of assessments upon the plaintiff; that the plaintiff had acquiesced in such previous increases of his rates of assessments both by the unincorporated society and by this defendant, and paid the same and has paid special assessments previously required of him,

both by said unincorporated society and by this defendant under his certificate of insurance sued on in this case. * * * That plaintiff, by his acts, has acquiesced in and ratified by his conduct and action the rights of this defendant and the rights of said unincorporated society to so amend the laws as to the rates of assessments, and that by such action the plaintiff had waived all objection to the exercise of such rights by this defendant, and this defendant avers that the raise in rates complained of by the plaintiff, were and are binding upon the plaintiff." (Printed record, pp. 20 and 21.)

13. The defendant avers that defendant's rights and claim of plaintiff are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank of the insurance department of this defendant, and the amendments thereto adopted by this defendant. (Printed record, p. 21.)

14. Defendant avers that at the time of the increase of rates by this defendant, complained of by the plaintiff, the same was necessary by reason of the fact that defendant's income was not sufficient to meet the liabilities accrued and to accrue under fourth class certificates issued to various members of its insurance department, and that in order to protect said certificate of plaintiff and all other certificates in said fourth class, and in order to promote and protect its own existence, this defendant was compelled to raise its rates, and that such rates were in contemplation of the parties under contract sued on. (Printed record, p. 25.)

15. Defendant avers that plaintiff's application upon which he obtained the certificate sued upon in this case, contained a provision whereby the insured agreed that he would be governed by and the contract of insurance should be controlled by the laws and regulations enacted by the corporation issuing said certificate governing said rank then in force or that might be thereafter from time to time enacted by the Supreme Lodge, or submit to the penalties therein contained. (Printed record, p. 24.)

16. Defendant avers that when it became a corporation and received dues, assessments or payments from the plaintiff in this case, it did so upon the obligation both express and implied, upon the part of the plaintiff, that he would comply with its laws in force, existing at and subsequent to the time this defendant was incorporated as aforesaid. That the defendant would not have received said premiums, and

had no authority to receive them upon any other basis. The plaintiff, since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws adopted by it from time to time, or with notice thereof, express or implied. (Printed record, bottom p. 14 and top of p. 15.)

17. Finally defendant also alleged in its amended answer, among other things, the following:

"That members of the Endowment Rank, of said old incorporation, said unincorporated society and of this defendant and of the insurance department of this defendant, occupied and always have occupied a dual position, each of said members being the insured on the one hand, and as such entitled to the benefits conferred upon them by their contract, and each of said members of said old corporation, said unincorporated society and of this defendant being on the other hand insurers, and as such bound to comply with all of the laws of said respective associations and to contribute to that end and into their respective funds, a sufficient amount to enable them and each of them to carry out the contracts made with its members, or for which they might become liable to its members.

Defendant avers that occupying such dual position which plaintiff occupied toward said corporations and said unincorporated society, the plaintiff is bound under the laws and regulations of same to contribute as required by same any and all amounts made necessary in order to enable said associations and corporations to carry out the contracts with its members, which contract plaintiff was as much obligated to carry out as was either of the other members of each of said societies or corporations, and it would be inequitable and unjust for this plaintiff to be permitted to recover from this defendant contributions or the value of his certificate, when he is an insurer, together with all of the other members of said fraternal association, is obligated to make such payments for the purpose of carrying out contracts entered into by said association with its respective members, plaintiff being one of the members, who had promised to pay certificates for which said association might

become liable." (Printed record, bottom p. 22 and top of p. 23.)

IMPORTANT EVIDENCE.

1. *No Evidence of Assuming Certificates:* On the trial of the case there was no evidence offered that plaintiff in error, defendant in the lower court, had assumed the certificates issued by the old corporation, except the section of the charter pleaded by defendant that it had assumed certain obligations of the "present" Supreme Lodge, Knights of Pythias, and the further fact that since the incorporation of the defendant, plaintiff in error here, viz., in June, 1894, it had received the dues and assessments on the certificate issued by the old corporation in 1885.

2. *No Evidence of Receiving Assets:* There was no evidence that the unincorporated society received any assets from the old corporation, or in any manner assumed the debts of the old corporation, unless the fact that it received dues and assessments was evidence of such assumption, or that the defendant received any assets from either the old corporation or the unincorporated society.

3. *Evidence that there were no Funds:* It was proved by W. O. Powers, the secretary who had charge of the books of the concern, as follows:

"When the present corporation was formed there was nothing to take over from the unincorporated concern. They took over its books and assumed the liabilities of the unincorporated society, but there were no funds on hand. I do not remember the exact sum, but there was practically nothing on hand. I think they were in arrears at that time. The money had all been used in paying death losses from year to year. The money had been used in settling claims it had acquired up to that time. The corporation did not take over the affairs of the unincorporated Knights of Pythias." (Printed record, bottom page 162.)

Again the witness says:

"None of the funds of the unincorporated society went into this new corporation." (Printed record, p. 162.)

There was absolutely no evidence that the old corpora-

tion turned over any assets to the unincorporated society, or to the new corporation. The testimony of Powers was the only evidence upon this point.

4. *Evidence that an Emergency Existed:* The actuary, Mr. S. H. Wolfe, testified that he had made a thorough examination of the affairs of the plaintiff in error, and said:

"In my opinion as an actuary, it was necessary for the Supreme Lodge at its convention in 1910 to adopt the laws that were there adopted, whereby the assessments paid by the members of the fourth class were changed; my reason for holding this opinion is that the assessments paid by the members in the fourth class were insufficient to enable the insurance department to continue to pay to the beneficiaries the amounts of the certificates as the certificates matured as death claims.

In my opinion the action taken by the Supreme Lodge at its convention in 1910 was *not only reasonable and fair, but was absolutely necessary to enable the beneficiaries to receive the amounts of the certificates when they became due.* This conclusion is based upon my careful study of the assessments then being paid by the members in the fourth class, the mortality experienced by said class, and *the deficiency in the funds which the fourth class should have had in its mortuary fund if the rates were not to be increased.*" (Printed record, p. 142.)

He further testified as follows: the amount of the mortuary fund in the fourth class (being the class in question) at the end of June, 1910, was seven hundred and twenty-three thousand dollars (\$723,000). At the end of July, 1910, was seven hundred thousand nine hundred and thirty dollars (\$700,930). (Top of p. 143 printed record.)

He further offered an exhibit showing the gradual decrease of this mortuary fund since December, 1908, which is as follows:

December 31, 1908.....	\$1,274,474
January 31, 1909.....	1,217,012
February 28, 1909.....	1,189,247
March 31, 1909.....	1,176,096
April 30, 1909.....	1,143,010
May 31, 1909.....	1,061,920
June 30, 1909.....	1,037,186
July 31, 1909.....	1,003,178

August 31, 1909.....	992,329
September 30, 1909.....	982,106
October 31, 1909.....	967,790
November 30, 1909.....	939,279
December 31, 1909.....	872,876
January 31, 1910.....	848,063
February 28, 1910.....	823,769
March 31, 1910.....	807,995
April 30, 1910.....	819,810
May 31, 1910.....	756,981
June 30, 1910.....	723,030
July 31, 1910.....	700,930

(Printed record, p. 144.)

5. *Evidence of an Agreement to Conform:* In the application of S. Mims for membership, in 1879, he used the following language:

"I hereby agree to conform to, and obey the laws, rules and regulations of the Order governing this Rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained." (Printed record, p. 137.)

He testified as follows:

"I joined this fraternal organization for the purpose of insuring my life for the benefit of Mrs. Mims, and also for the purpose of helping other Knights of Pythias. I presumed that the organization was not for profit, but for protection of the individual members constituting the insurance circle. I supposed that the only source of revenue to meet my policy and other policies issued by the insurance department would be obtained from assessments on those insured, and I also presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase. I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died

that the assessments would be less per head on those five thousand members than it would be when the ranks had been reduced to two thousand. As the membership decreased the death rate increased, and they would be obliged to increase the assessments if they met their obligations according to the contract; that is, on the assessment plan. I presumed that this entire insurance scheme was based on the assessment plan.

If you reduced the membership to two thousand and the death rate increased as they grew older, you certainly would have to increase that rate if you met the obligations. I do not remember whether they raised the rates on me in 1888 or 1901. They raised them so often that I can not remember the dates. The Knights of Pythias has raised the rates frequently, and I paid those raised rates up to the time of this last raise, when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out by certificate until 1910, when I declined to pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonged to the lodge and my dues are paid up now. I belong to the Red Cross Lodge at Ft. Worth." Printed record, p. 120, p. 121 down to Redirect Examination.)

6. *Evidence of Good Standing:* The certificate sued on contains, among other things, the following statement:

"This certifies that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing the date of April 11, 1879, and his absolute surrender of the certificates heretofore held by him in first and second classes for cancellation, as requested in his application for transfer to the fourth class, bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the

full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws, the sum of three thousand dollars (\$3,000) will be paid by the Supreme Lodge, Knights of Pythias of the World to Mary J. Mims, etc.

Provided, however, that if at the time of the death of said Brother, one monthly payment to the endowment fund by members holding an equal amount of endowment, shall not be sufficient to pay the amount of endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the endowment fund by each member holding equal amount of endowment held by said Brother. And it is understood and agreed that any violation of the withinmentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof." (Printed record, p. 98, top of p. 99.)

7. *Evidence of Granted Power:* The charter of the old defunct corporation obtained the 5th of August, 1870, contained, among other things, the following provision:

"That the Supreme Lodge shall have power to alter and amend its constitution and by-laws at will." (Printed record, p. 93.)

INSTRUCTIONS TO THE JURY.

1. *Defendant's Request:* The case came on for trial, and the defendant, plaintiff in error here, asked the court for a peremptory instruction against the plaintiff for itself. (Printed record, pp. 56, 57.)

That being refused, defendant asked the court to instruct the jury, as follows:

"In the event the first three special charges are not given, defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and the undisputed evidence showing that plaintiff after

the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution and by-laws of this defendant corporation, and the court instructs you that under such charter, constitution and by-laws the defendant had the right to raise the rates of the members of the fourth class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations to the members of the fourth class, then you are instructed to find for the defendant." (Printed record, p. 59.)

Defendant also requested the following charge:

"In the event that the first three special charges shall be refused defendant asks the following:

Gentlemen of the Jury: You are instructed that the plaintiff and all those in the fourth class of the defendant's insurance department were mutual insurers of each others' lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay these certificates as they matured, they had the implied power to increase the rates to such point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant." (Printed record, bottom p. 58, top of p. 59.)

2. *Plaintiff's Request:* The court, at the request of plaintiff's counsel, peremptorily instructed a verdict for the plaintiff for three thousand six hundred and sixty-three dollars and thirty-five cents (\$3,663.35), which the jury, under directions of the court, immediately returned into court. (Printed record, bottom p. 62.) For this amount the judgment was rendered. (Printed record, pp. 63, 64.)

APPEAL.

The necessary steps were then taken by motion for a new trial, assignments of error, etc., and the case was carried to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the state of Texas. It was there in all things affirmed. (Printed record, pp. 178, 179.) The judgment of affirmance, at a later day of the term, was modified and reduced to the sum of three thousand fifty-two dollars and thirty-five cents (\$3,052.35). (Printed record, pp. 206, 207.)

FINDINGS OF THE COURT.

After stating many of the facts the Honorable Court of Civil Appeals disposed of the Federal questions, as follows:

"Appellant presents several assignments of error and urges many propositions thereunder in support of its contention that the trial court erred in directing the jury to return the verdict rendered. We do not regard it necessary to state and discuss seriatim the propositions contended for by appellant, and shall state without regard to the order in which these propositions appear in the brief, our conclusions, which will sufficiently indicate the questions raised.

1. We are not aware of any authority supporting the contention of appellant that the question (or any of the questions) presented for decision to be one of exclusive 'federal jurisprudence,' and making it incumbent upon this court to follow the rules laid down by the Supreme Court of the United States in determining the rights of the plaintiff, as against the defendant in this case. * * *

2. The evidence is sufficient to show that the defendant, immediately upon its incorporation, took over and absorbed the membership and entire insurance business of the corporation which issued the policies or contract of insurance involved in this suit, and of the unincorporated society which succeeded it, and that continuously from the date of its incorporation in 1894 up to January, 1911, received and accepted from appellee monthly payments of dues and assessments as a consideration for carrying out his contract of insurance, and these facts rendered it responsible in law for a breach

of said contract in the same way and to the same extent as if the contract had been issued in the first instance and by it broken. Evidently, defendant contemplated this when it applied for and obtained its charter. Besides, we think the provision in the defendant's charter, which is set out in our statement of the facts, obligated the defendant to perform the contract of insurance upon which appellee's suit is predicated, and made it liable in damages to appellee for a breach thereof." (Printed record, p. 172.)

The provision of the constitution referred to is found on p. 171 of the printed record, and reads as follows:

"The defendant's charter granted in 1894 provides that, 'all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any laws which provides for the extinguishing of claims or contracts by limitations of time.'"

Again, touching the power of rerating, the court said:

"The rerating of appellee, whereby the assessments against him were so greatly increased, was, we believe, unauthorized and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon it." (Printed record, p. 173.)

The court also found that:

"The plaintiff in his application for the certificates issued to him in 1879 and 1885, agreed to conform to and obey the laws, rules and regulations of the order governing the Endowment Rank of the old corporation, 'now in force, or that may hereafter be enacted, or submit to the penalties therein contained'; that the certificates issued to him were conditioned that 'in consideration of the payment hereafter to said endowment rank of all monthly payments as required, and the full compliance with

all the laws governing this rank, now in force, or that may hereafter be enacted', there would be paid to Mary J. Mims, plaintiff's wife, the sums therein specified, and declared that it was understood and agreed that any violation of the mentioned conditions herein, or the requirements of the laws in force governing said rank should render the certificate void; that in the laws passed in 1884 it is provided that 'these laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias, by a two-thirds vote.'" (Printed record, p. 173.)

The court further held:

"The contract of insurance entered into with the appellee did not stipulate that appellant should have the right to increase the rate of assessment against him and the reservation of a general power to amend its by-laws, nor the recitation in said contract to the effect that it was issued upon the condition that the appellee paid to the endowment rank 'all monthly payments as required and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted,' authorize appellant to increase the rate of assessments as the record discloses was done. While a fraternal insurance society or association may so amend its constitution and by-laws to make 'reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or implicitly by the contract itself.' And it seems clear that such a corporation may expressly reserve the right and power to increase the monthly assessments of its members, but such reservation must be so explicitly and clearly stated in the contract itself or in some paper forming a part of the contract, that the member insured is fully advised that the terms of the contract he is entering into may be changed by the insurer in that respect. By the terms of the certificate issued to him, and the by-laws fixing the rate of his monthly assessment at the time of its issuance, which became and was a part of said contract, appellee knew what he was

obligated to pay and what he was entitled to receive, and under the general reservation to amend its constitution and by-laws and the general stipulation in the contract, to the effect, that, appellee would pay all monthly payments as required and fully comply with all the laws governing the Endowment Rank, as a condition upon which the money therein specified was to be paid to his beneficiary, no amendment materially changing and impairing the contract as made with him could be enacted or adopted that would be binding upon him." (Printed record, p. 174.)

Specifications of Error.

Application was then made to the Supreme Court of the state of Texas for a writ of error to review the judgment of the lower court. The writ of error was refused, one of the three justices dissenting. (See printed record, bottom of p. 207.) Application was then made to Honorable Anson Rainey, Chief Justice of the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, for writ of error (Printed record, pp. 108, 109, 110 and 111), which was by him granted, and the case brought here (Printed record, p. 212), plaintiff in error making the following assignments of error:

I.

"The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the state of Texas erred in determining and holding that the questions involved in said case and presented to it for decision were not ones of exclusive federal jurisprudence, and making it incumbent upon that court to follow the rules laid down by the Supreme Court of the United States in determining the rights of plaintiff as against the defendant.

II.

The said court erred in holding and determining in said case that by the terms of the charter of your petitioner, it, Supreme Lodge, Knights of Pythias, was obligated to perform the contract of insurance upon which said Mims' suit was predi-

cated, and made your petitioner liable in damages to appellee for a breach thereof.

III.

The said court erred in holding and determining that the rerating of appellee, that is to say, the raising of the monthly assessments to the sum of thirty-four dollars and eighty cents (\$34.80) per month against him, was unauthorized by the terms of your petitioner's charter.

IV.

Said court erred in holding and determining in its said opinion that the rerating or raising of the monthly assessments to the sum of thirty-four dollars and eighty cents (\$34.80) constituted a breach of plaintiff's insurance contract, and entitled him to recover from your petitioner the sums paid to it, the unincorporated society, and the old corporation, which had issued said policy.

V.

Said court erred in holding and determining that there was any evidence, other than the provision of petitioner's charter, which would support the judgment to the effect that your petitioner, plaintiff in error, had assumed the contract of insurance upon which appellee's suit is predicated.

VI.

Because said court erred in inferentially holding that the old corporation issuing the contract sued upon, did not have authority to rerate or raise said assessments above the amount of three dollars and sixty cents (\$3.60) per month.

VII.

The said court erred in holding that your petitioner was without power under the terms of its charter to issue or assume any contracts of insurance except as same should be governed and limited by the charter and laws of your petitioner passed in conformity thereto.

VIII.

The court erred in holding that the agreement of plaintiff to conform to and obey the laws, rules and regulations of the Order governing the rank of insurance now in force (which meant the rank to which plaintiff belonged), or that may be hereafter enacted, or submit to the penalties therein contained, did not authorize your petitioner to pass any laws in respect to said insurance that were reasonably necessary.

IX.

The said court erred in determining that the obligation in the application for the insurance certificate sued upon to pay all monthly dues required, did not obligate the plaintiff to pay the assessments made by your petitioner.

X.

Because said court erred in rendering a judgment against your petitioner for any sum whatsoever."

FINAL ISSUES.

The above errors may be grouped for the purpose of simplifying the argument into four fundamental questions which therefore become the main issues in the case.

Thus: ERROR I becomes **Issue I**. Did the federal court have exclusive jurisdiction over the case?

ERRORS II, V and VII rest upon

Issue II. Did the contract of the original corporation become binding upon the present corporation, plaintiff in error in this case?

ERRORS III, IV and VI rest upon

Issue III. Was there any authorization for the increasing of assessments against contracts made under the old corporation?

ERRORS VIII and IX rest upon

Issue IV. Has the defendant in error estopped himself from relying upon the original contract?

ERROR X is merely a general objection.

POINTS AND AUTHORITIES.

ISSUE I.

The Honorable Court of Civil Appeals erred in determining that the questions involved in this case were not ones of exclusive federal jurisdiction.

Point 1.

It adjudicated the case upon the conditions imposed by a federal charter.

28 Stat. at L., §§ 96, 97;

Texas &c. R. Co. v. Hill, 237 U. S. 208, 59 L. ed. 918;

Texas &c. R. Co. v. Marcus, 237 U. S. 215, 59 L. ed. 924;

Section 237, Judicial Code;

Pacific R. R. Cases, 115 U. S. 1, 29 L. ed. 319;

Union Pac. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 319;

Supreme Council Royal Arcanum v. Green, 237 U. S. 531, 59 L. ed. 1089.

ISSUE II.

The Honorable Court of Civil Appeals erred in determining that the plaintiff in error, it, Supreme Lodge, Knights of Pythias, obligated itself to perform the contract of insurance upon which Mims' suit was predicated.

Point 1.

The section of the charter relied upon does not justify such a conclusion.

Section 3. Charter, Lodge Knights of Pythias. (Printed record, p. 179.)

Point 2.

The fact that plaintiff in error had collected premiums on the old policy from the defendant in error did not constitute an assumption of the contract or policy sued upon.

Eddy v. Hinnant, 82 Tex. 354, 18 S. W. 562;
 Approved in Hutchinson v. International &c.
 R. Co. (Tex.), 111 S. W. 1106;
 Article 3356, Rev. Civ. Stat. of Texas, 1911.

Point 3.

The plaintiff in error was without power to assume the indebtedness sued on except on the defendant in error submitting to the measuring of liabilities by the laws of the new corporation.

29 Cyc. 70;
 Bollman v. Supreme Lodge, Knights of Honor
 (Tex.), 53 S. W. 722;
 54 S. W. 246. Texas case in which a writ of
 error was refused;
 Wineland v. Knights of the Maccabees, 148
 Mich. 608, 112 N. W. 696;
 Gibbs v. Supreme Lodge, Knights of Pythias,
 173 Mo. App. 34, 156 S. W. 11;
 Watson v. National L. &c. Co., 189 Fed. 872;
 Niblack Benefit Society and Accident Insurance
 (2d ed.), 33, 34, § 18.

ISSUE III.

The Supreme Lodge, Knights of Pythias, was authorized to increase the assessments as it did.

Point 1.

The terms of the old policies conferred such a power.

Certificate No. 5383 (Printed record, p. 173).

Point 2.

The policy sued upon and substituted for the old policy also conferred such power.

Certificate of Membership No. 4183 (Printed record, pp. 97, 98, 99).

Point 3.

The constitution and by-laws construed together gave such a power.

Section 9. Charter of old corporation (Printed record, p. 93).

Articles V and VI. By-laws (Printed record, p. 149).

Articles V and VII. Powers of the Supreme Lodge (Printed record, p. 150).

Articles V and VI. Provisions (Printed record, pp. 152, 153).

Article XI. Amendment (Printed record, p. 153).

Sections 1 and 6. Amendment and by-laws (Printed record, p. 153).

Form of application (Printed record, pp. 153, 154, 155).

Amendment of article IV (Printed record, pp. 155, 156, 157).

Cases:

Union Pac. R. Co. v. Myres, 115 U. S. 1, 25, 29 L. ed. 319;

Messer v. Ancient Order United Workmen, 180 Mass. 321, 62 N. E. 252;

Wineland v. Knights of the Maccabees, 148 Mich. 608, 112 N. W. 696;

Williams v. Supreme Council, C. M. B. A., 152 Mich. 1, 115 N. W. 1060;

Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154;

Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409;

Barbot v. Mut. Reserve Fund Life Ass'n, 100 Ga. 681, 28 S. E. 498;

Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208, 37 S. E. 854;

Richmond v. Supreme Lodge, Order of Mutual Protection, 100 Mo. App. 8, 71 S. E. 736;

Miller v. National Council, K. & L. of S., 69 Kans. 234, 76 Pac. 830;

Head Camp Pac. Jurisdiction Woodmen of the World v. Woods, 34 Colo. 1, 81 Pac. 261;

Shepperd v. Bankers' Union of the World, 77 Nebr. 85, 108 N. W. 188;

Conner v. Supreme Commandery Golden Cross,
117 Tenn. 549, 97 S. W. 306;
Champion v. Hannahan, 138 Ill. App. 387;
Pierce v. Bankers' Union of the World, 140 Ill.
App. 495;
Mock v. Supreme Council Royal Arcanum, 121
App. Div. (N. Y.) 474;
Fullenwider v. Supreme Council Royal League,
180 Ill. 621, 54 N. E. 485, 72 Am. Rep. 239;
Jones v. Knights of Maccabees (Wash.) (de-
cided June, 1915);
Bartrum v. Supreme Council Royal Arcanum,
6 Ont. W. R. 404;
Haydel v. Mutual Reserve Fund Life Ass'n,
98 Fed. 200;
Haydel v. Mutual Reserve Fund Life Ass'n,
104 Fed. 718.

Point 4.

A mutual company has the inherent right to amend and alter its by-laws.

Supreme Lodge, Knights of Pythias, v. Knight,
117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

Point 5.

The United States Statutes at Large provide such authority.

28 Statutes at L., §§ 96, 97 (Printed record,
p. 95).

Point 6.

The authority was repeatedly exercised.

(Printed record, pp. 126, 127.)

(Printed record, pp. 120, 121, down to Redi-
rect Examination.)

ISSUE IV.

The defendant in error has estopped himself from denying the right of the plaintiff in error to increase the rates of assessment as in 1910, if necessary.

Point 1.

The original certificate was offered upon an express condition of payment to the Endowment Rank of all assessments

as requested and in full compliance with all the laws governing the Rank then in force or that might thereafter be enacted.

Old Corporation, 1888, art. VII, § 17. (Printed record, pp. 156, 157.)

Article 7, § 9. (Printed record, p. 156.)

Article 1, § 1. (Printed record, p. 109.)

Article 3, § 1. (Printed record, p. 110.)

Article 3, § 2. (Printed record, pp. 110, 111.)

Certificate. (Printed record, p. 96.)

Certificate in Lien. (Printed record, pp. 98, 99.)

Point 2.

The defendant in error accepted the insurance with a knowledge that unless the membership were kept up the assessments must necessarily increase.

Testimony. (Printed record, p. 121.)

Point 3.

Defendant in error also acquiesced in the power by paying a number of times such increased assessments.

Testimony. (Printed record, p. 121.)

Wineland v. Knights of the Maccabees, 148 Mich. 608, 112 N. W. 696;

Gibbs v. Supreme Lodge, Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11;

Manning v. San Antonio Club, 63 Tex. 166, 51 Am. Rep. 639;

29 Cyc. 70.

ARGUMENT.

ISSUE I.

The Honorable Court of Civil Appeals erred in determining that the questions involved in this case were not ones of exclusive federal jurisdiction, for

Point 1.

It adjudicated the case upon the conditions imposed by a federal charter, because

- (1) It held that under the terms of the federal charter the new corporation assumed the obligations of the old corporation, and

- (2) That the new corporation had no power granted it by its federal charter to increase the rates of insurance.

And these two provisions of its charter were exclusively questions for the federal court, because

- (1) The charter of the plaintiff in error is a public statute of the United States,
28 Stat. at L., 96, 97.

and by virtue of the Constitution of the United States this court is the final arbiter of all questions relating thereto and depending thereon, for

- (a) It is said in the case of *Texas &c. R. Co. v. Hill*, 237 U. S. 208, 59 L. ed. 918,

"As a corporation created by an act of congress, the plaintiff in error is inherently entitled to invoke our jurisdiction. Hence the motion to dismiss is without merit." Again,

- (b) It is expressly held in the case of *Texas &c. R. Co. v. Marcus*, 237 U. S. 215, 59 L. ed. 924, in substance as follows:

That the judgment of a federal circuit court of appeals in an action against a corporation, created by an act of congress may be brought up for review in the Federal Supreme Court by a writ of error. Again,

- (c) Section 237 of the Judicial Code provides that

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed,

by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgments or decrees of such state court, and may at their discretion award execution or remand the same to the court from which it was removed by the writ."

- (2) The judicial construction of a charter of a federal corporation is a federal function and constitutes a suit "arising under the laws of the United States", for

(a) It is so held by the following cases:

Pacific R. R. Cases, 115 U. S. 1, 29 L. ed. 319;
Union Pac. R. Co. v. Harris, 158 U. S. 326, 39
L. ed. 1003.

It is well established that where a suit is brought in a state court and a federal question is presented the defendant may permit the case to go to judgment and take his appeal to the Supreme Court of his state and, if the decision of the court is against the federal right for which he contends, he may then sue out a writ of error to the Supreme Court of the United States and present the question before that tribunal. The case comes before that court presenting exactly the same questions as would be presented if the defendant had taken the other course—had petitioned for a removal to the federal court, and had carried the case to the Supreme Court of the United States by way of appeal or writ of error from the federal court. The plaintiff in error in this case took the former course. He litigated the case to final judgment in the state court and carried the cause to the Court of Civil Appeals of the State of Texas, where his federal right for which he had contended was denied. "This was the highest court to which the plaintiff in error could appeal in that state. It therefore sought by a writ of error to that court to have its federal right adjudicated in this court, and

- (b) It is a practice essential to harmony among states and the principle of exclusive jurisdiction was recognized by this court in a case affecting Massachusetts, to wit:

In the case of *Supreme Council, Royal Arcanum v. Green*, 237 U. S. 531, 59 L. ed. 1089, this court reversed the judgment of the Court of Appeals of New York, which court had refused to give full faith and credit to the decision of the Supreme Court of Massachusetts in a case in which it had determined the charter rights of the Royal Arcanum, a corporation organized under the laws of the State of Massachusetts. It was there correctly held that the Supreme Court of Massachusetts was the final arbiter as to the meaning and powers of a corporation chartered by a public statute of that state. This court correctly held that the decision of the Massachusetts Supreme Court was binding upon all of the states under the full faith and credit clause of the Constitution of the United States. No other decision could be reached in such case unless we are to have anarchy in the construction of statutes granting powers to corporations. In the present case, if the plaintiff in error is held to be concluded by the supreme courts of the various forty-eight states, at least two of which are absolutely contradictory to those of the others which have passed upon the questions involved, its business will result in complete anarchy. A certificate of insurance held by a member in Texas will be held to mean one thing, and the certificate of another member, in exactly the same language, will be held in Indiana to mean the opposite. It is evident that in the *Green* case the Supreme Court of Massachusetts was given the right and the power to decide finally as to the construction and meaning of its own statute. It is just as plain that the supreme courts of the various states do not have the conclusive right to pass upon the statutes of a different jurisdiction. From the very nature of the case the federal courts are the ones which must pass upon the rights, duties, and powers of a corporation which is chartered by a public statute of the United States. Otherwise we would have forty-eight different constructions upon a single statute, none of which would be controlling outside of the state wherein it was decided. As the Supreme Court of Massachusetts is the final arbiter of the statutes of Massachusetts, by the same token the Supreme Court of the United States must be the final arbiter of all the statutes of the United States.

Hence the construction of these two provisions of its charter were pre-eminently questions for the federal court, and the Court of Civil Appeals erred in not recognizing the rule so well established that decisions of federal courts in

respect to federal statutes are conclusive on state courts. The state court would have been quick to have recognized the reciprocal rule, that the decisions of a state court in respect to the effect of a state statute are conclusive on the federal court. It is a curious fact that the learned Court of Civil Appeals did not recognize this elementary principle.

ISSUE II.

The Honorable Court of Civil Appeals erred in determining the plaintiff in error, it, Supreme Lodge, Knights of Pythias, obligated itself to perform the contract of insurance upon which Mims' suit was predicated, for

Point 1.

The section of the charter relied upon does not justify such a conclusion, because

- (1) The interpretation of the phrase "present Supreme Lodge, Knights of Pythias," in section three, as follows:

"Section 3. That all claims, accounts, debts, things in action, or other matters existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section '1' of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitation of time." (Printed record, p. 179.)

A fair construction of this language not only fails to support the contention of defendant in error, but actually disproves it. It will be remembered that there was an old fraternal Beneficiary Society, Knights of Pythias, created in the District of Columbia by the authority of the federal statute of 1870, and which expired by its own terms in 1890. From 1890 until 1894 an unincorporated association operated as the Supreme Lodge, Knights of Pythias. It was in existence at the date when the charter of the plaintiff in error was obtained. In other words, it was incorporated by an act of congress, of which section 3 is a part. It provided that the corporation should assume the debts of the present Supreme Lodge, Knights of Pythias. It is only necessary to inquire what was the "present Supreme Lodge, Knights of Pythias." Did it mean the one then in existence—the unincorporated association—or did it mean the incor-

porated Supreme Lodge, Knights of Pythias, the charter to which had expired four years before? To ask the question is to answer it. If one should write "present Chief Justice of this Honorable Court" no one would suspect that the writer meant the former distinguished Chief Justice who has been dead for more than four years. If one should write of the present Governor of Texas, no one would suspect that he meant a man who was governor four years ago, and is now dead. If one should now write of the present occupant of the White House—the President of the United States—no one would suggest that it was a former occupant of the White House who has not been there for four years. If a husband should make a will designating his present wife as a beneficiary, no one would suspect that he sought to name a former wife who had been dead for four years. But why multiply illustrations?

We repeat that the language of section 3 not only fails to assume the debts of the old corporation, but by its terms it excludes them. This conclusion will not be changed by a suggestion that if the unincorporated society assumed the obligations of the old corporation, the effect of this section would be to have the new corporation assume them likewise, because there is no evidence of any kind or character that the unincorporated society assumed the debts of the old corporation. If such assumption had never been made the defendant in error failed to offer any evidence of it.

Point 2.

The fact that plaintiff in error had collected premiums on the old policy from the defendant in error did not constitute an assumption of the contract or policy sued upon, because

- (1) This principle is well settled by the Supreme Court of Texas in the case of *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. 562, where the question arose as follows:

The East Line Railroad, a corporation in Texas, had entered into a contract with Hinnant giving him free passage over its railway as a part of the consideration for its right of way. The East Line sold its road to the Missouri, Kansas and Texas Railway Company. Hinnant sought to enforce his obligation against it as a succeeding owner of the corporation, and compel it to carry him free. In discussing that the Supreme Court used the following language:

"If it be admitted that the East Line Company sold and conveyed its railway and other property to the Missouri, Kansas and Texas Company, as far as it was in the power of the one to buy and of the other to sell, yet in our opinion it does not follow that the plaintiff could recover in this case. The contract made by the brother with the East Line Company, in so far as it stipulated for a free passage for him, inured to his benefit, and under the rule of decision in this State he had a right of action for its breach against the company with whom it was made. But in order to show a right of action in the present case, *it was necessary for the plaintiff to prove not only that the Missouri, Kansas and Texas Company bought the East Line Railway, but also that it assumed the obligations of the East Line Company, or at least promises to perform the particular contract upon which the action in this case is based.* If A sell B a tract of land upon which a vendor's lien exists in favor of C, the land may be subjected to the payment of the debt; but B is not liable upon the contract for the purchase money, unless in his contract with A he has assumed to pay it, nor would any recognition of the promise of A to pay C the purchase money or any part payment upon it make him liable personally upon it. And so with the Missouri, Kansas and Texas Railway Company and its receivers in this case. They could respect *the contract of the East Line and Red River Railway Company as long as they desired*, but they were not bound to perform it. It is true that by the failure to perform they may have forfeited the *title to the right of way and to the other property* conveyed by B. C. Hinnant and his wife to the East Line Company; still, they were not responsible *in damages for the failure to carry it out.*"

This was later approved in *Hutchinson v. International &c. R. Co.* (Tex.), 111 S. W. 1106. Again,

- (2) There was no such memorandum signed by the defendant as was made necessary by legislative enactment.

Indeed, the Supreme Court of Texas could have rendered no other decision upon that question without ignoring the statutory enactments of the state which had been

in existence for three-quarters of a century. In 1840 the Texas legislature enacted a statute which now constitutes Article 3356, Revised Civil Statutes of Texas, 1911. In so far as applicable, it reads as follows:

“Article 3965. (2543.) (2464.) Written Memorandum Required to Maintain Certain Actions. No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized: * * *

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another.”

This constituted Article 2875 of what was known as Paschall's Digest, which is an old compilation of the statutes. It was carried forward in the Revised Statutes of 1879 as Article 2464, and in the Revised Code of 1895 as Article 2543.

It will be seen, therefore, that the plaintiff in error could not be charged with the debt of the old corporation unless the promise or agreement, or some memorandum thereof shall be in writing and signed by the party charged therewith, or by some person by him thereunto duly authorized. Unless section 3 of the statute in question constitutes such an assumption of the indebtedness there was none.

It will be seen, therefore, that the Honorable Court of Civil Appeals was obliged to base its decision upon this written assumption, or decide in favor of plaintiff in error. The harsh part of the decision of the Court of Civil Appeals consists in fact that they construed that section to be an assumption of the indebtedness, and yet they exempt the contract thus assumed from all control by the corporation. The court treats the contract as obligating plaintiff in error to pay the full amount of the policy therein mentioned, and yet denies to the plaintiff in error power under its charter to provide itself with funds to meet these obligations.

Point 3.

The plaintiff in error was without power to assume the indebtedness sued on except on the defendant in error sub-

mitting to the measuring of liabilities by the laws of the new corporation, because

- (1) It is a well-settled rule that when an old corporation issues a policy or a contract, and a new corporation is organized and receives the dues on the old certificates issued by its predecessor, the obligation thus existing by reason of the dues received must be measured and the liabilities must be fixed by the laws of the new corporation.

Cases:

- Bollman v. Supreme Lodge, Knights of Honor (Tex.), 53 S. W. 722—a case in which a writ of error was refused by the Supreme Court. (See 54 S. W. 246);
 Wineland v. Knights of the Maccabees, 148 Mich. 608, 112 N. W. 696;
 Gibbs v. Supreme Lodge, Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11.

It follows, therefore, that any liability under the certificate sued on must be treated as if it were a liability under a certificate issued by the new corporation, and limited and controlled by the new corporation's charter and by-laws.

Cases:

- Watson v. National L. &c. Co., 189 Fed. 872;
 Niblack Benefit Society and Accident Ins. (2d ed.) 33, 34, § 18;
 29 Cyc. 70.

The Honorable Court of Civil Appeals should therefore have held that the plaintiff in error was without power to assume the indebtedness sued on except on the basis that the defendant in error on becoming one of its members subordinated himself to its laws.

ISSUE III.

The Supreme Lodge, Knights of Pythias, was authorized to increase the assessments as it did, for

Point 1.

The terms of the old policy conferred such a power, because

- (1) Within said certificate the defendant explicitly agreed to conform to and obey the laws, rules, and regulations of the Order governing the Endowment Rank of the old corporation "now in force or that may be

hereafter enacted, or submit to the penalties therein contained." (Printed record, p. 173.)

It will be noted that defendant in error applied for and obtained two certificates on the 30th of April, 1879, in the old corporation, one for one thousand dollars (\$1000) and the other for two thousand dollars (\$2000), the one being No. 5383 and the other No. 7869, each payable to his wife. Defendant in error in his application for these certificates, as well as the one sued upon, agreed to conform to and obey the laws, rules and regulations of the Order governing the Endowment Rank of the old corporation "*now in force or that may be hereafter enacted, or submit to the penalties therein contained.*" (Printed record, p. 173.) The certificates are precisely alike, except in amount. For that reason only one of them is here set out, No. 5383, which reads as follows:

"No. 5383.

CERTIFICATE OF MEMBERSHIP

ENDOWMENT RANK OF THE ORDER OF KNIGHTS OF
PYTHIAS.

This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 and is a member in good standing in said Rank. And in consideration of the *representations and declarations* made in his application bearing date of April 11, 1879, which *application* is made a part of *this contract*, and the payment of the prescribed admission fee; and in consideration of the *payment hereafter to said Endowment Rank of all assessments as required*, and the full *compliance with all the laws governing the Rank, now in force, or that may hereafter be enacted*, and shall be in good *standing* under said laws, the sum of one thousand dollars (\$1000) will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master Exchequer, upon due notice and proof of death, and good standing in the Rank at the time of death, and the surrender of this certificate. Provided, however, that if at the time of the death of the said Brother S. Mims, Jr., there shall be less than one thousand members in this class, there shall only be paid a sum

equal to one dollar (\$1) for each member in good standing in this class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

In witness Whereof, We have hereunto subscribed our names and annexed the seal of the Supreme Lodge, Knights of Pythias of the World.

(Signed) D. B. WOODRUFF,
Supreme Chancellor.

JOSEPH DOWDALL,
Supreme Keeper of Records.

Issued this the 30th day of April, 1879, P. P. XVI,
at Indianapolis, Indiana, and registered in Book 1,
Folio 132.

(Signed) JOHN B. STUMPH,
Supreme Master of Exchequer."

(Printed record, p. 96.)

Point 2.

The policy sued upon and substituted for the old policy also conferred such power, because

- (1) On May 7, 1885, the defendant in error applied for the certificate sued on in lieu of the other two. His applications for the change were like the old certificate, identical except in number, and made on the same day. (See bottom of p. 97, and top of p. 98, Printed record.) A new certificate for three thousand dollars (\$3000) was issued to him on the 29th of May, 1885. It reads as follows, to wit:

"CERTIFICATE OF MEMBERSHIP.

No. 4183.

Fourth Class. \$3000.

ENDOWMENT—OF THE ORDER OF KNIGHTS OF
PYTHIAS.

This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations

made in his Application, bearing date of April 11, 1879, and his absolute surrender of the Certificates heretofore held by him in first and second classes for cancelation, as requested in his application for transfer to the fourth class, bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars (\$3000) will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, wife, as directed by said Brother in his Application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon due notice and proof of death, and good standing in the Rank at the time of the death and surrender of this certificate.

Provided, however, that if at the time of the death of said Brother, one monthly payment to the endowment fund by members holding an equal amount of endowment shall not be sufficient to pay the amount of endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the endowment fund by each member holding equal amount of endowment. And it is understood and agreed that *any violation of the within-mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.*

In Witness Whereof, We have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World.

(Signed) JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest:

R. F. COWAN,

Supreme Keeper of Records and Seal.

Issued this 29th day of May, 1885, P. P. XXII,

at Washington, District of Columbia, and registered in Book 1, Folio 84.

(Signed) HALVOR NELSON,
Supreme Secretary."

(Printed record, pp. 98, 99.)

But if this were a case of first impression we submit that the facts are not susceptible of any other construction than that the old corporation and the new were authorized to increase the rates to such amount as should be necessary to meet the obligations when due. What could be the meaning of the language, "I agree to conform to and obey the laws, *rules and regulations of the Order governing the Endowment Rank* 'now in force or that may hereafter be enacted, or submit to the penalties therein contained' "? It must be remembered that the Endowment Rank is the insurance part of the Order. That was recognized by the defendant in error. On p. 121 of the printed record may be found a part of his redirect examination. In this he says:

"I have remained a social member and am a member now, keeping my dues paid all the while."

The obligation then to obey the laws, rules and regulations of this Rank was not simply to obey the by-laws of the social order, but to obey the laws in relation to the Uniform Rank or insurance department. The Uniform Rank was an entirely different organization consisting of members of the other organization.

Article I, section 1, says:

"A section of the Endowment Rank shall consist of not less than seven members who are in good standing. It shall be known as Section No. — of the Endowment Rank, of the Knights of Pythias."
(Printed record, p. 109.)

Article III, section 1, says:

"No person shall be eligible for membership in this Rank unless he be a Knight of Pythias in good and regular standing in his lodge, and not over fifty years of age: Provided, until June 1, 1878, all members of the Knights of Pythias may become members of the Endowment Rank without regard to age, provided they possess the other required qualifications."
(Printed record, p. 110.)

"Section 2. Applications for membership must be

accompanied by a certificate from the Lodge to which the applicant belongs, that he is not in arrears for dues, and a medical certificate from the physician, designated by the section, to which the application is made. A fee of three dollars (\$3) must accompany the application." (Printed record, p. 110.)

The succeeding portions provide that if he sever his connection with the Lodge of the Knights of Pythias, he also severs his connection with the Uniform Rank. (Printed record, pp. 110, 111.)

When a member joined the Uniform Rank, and obligated himself to obey all of its rules, laws and regulations theretofore passed, or should be thereafter passed governing that Rank, he meant that he was to obey all the rules, laws and regulations passed governing the insurance department. This necessarily meant that he agreed that the rates should be readjusted, if necessary. The certificates as issued to him contained this statement:

"This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application bearing date of April 11, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee; *and in consideration of the payment hereafter to said Endowment Rank of all assessments as required*, and the full compliance with all the laws governing the Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of one thousand dollars (\$1000)." (Printed record, p. 96.)

The certificate issued in lieu of the two last mentioned, on the 29th of May, 1885, contains this statement, among others:

"This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing date of April 11, 1879, and his absolute surrender of the certificates heretofore held by him in first and second classes for cancelation, as requested in his application for trans-

fer to the fourth class bearing date of May 7, 1885, all of which is made a part of this contract, *and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted* and shall be in good standing, under said laws, etc." (Printed record, pp. 98, 99.)

What could be the meaning of his agreement to pay all monthly payments as required? Could it mean anything other than that he would make the payments assessed by the Uniform Rank of the Knights of Pythias? What is the meaning of the language, "that he should fully comply with all the laws governing this Rank now in force, or that may hereafter be enacted", if it were not intended to confer the power to pass any laws necessary to preserve the integrity of the certificates issued and to secure their payment?

We repeat that if no legal construction of these instruments had ever been had this language is of itself enough to bind him to pay whatever assessments were necessary to enable the Endowment Rank to meet its obligations.

Point 3.

The constitution and by-laws construed together gave such a power, because

(1) At the date of the issuance of the new certificate the charter of the old corporation contained the following provision:

"9. And be it further known, That the said Supreme Lodge shall have power to alter and amend its constitution and by-laws at will."
(Printed record, p. 93.) And

(2) In 1880 the old Corporation adopted, among others, the following by-laws:

"ARTICLE V.

Section 5. The power to adopt any additional forms, change, alter or amend any of the secret work, laws, or the business details connected therewith, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the Rank

in detail and require of all the Sections a strict conformity therewith.

ARTICLE VI.

- Section 4. These laws may be altered or amended at any regular session of the Supreme Lodge, K. of P." (Printed record, p. 149.) And
- (3) Under the head of "Powers of the Supreme Lodge," the Supreme Lodge in 1884 adopted the following provisions:

"ARTICLE V.

Section 4. If after paying a benefit, there remain in the fund belonging to the class of which the deceased was a member, a less sum than is sufficient to pay a benefit in that class, the Supreme Secretary shall immediately notify the Secretary of each section to collect and forward to him an assessment of one dollar and ten cents (\$1.10) from each member of said class, which must be paid within thirty days.

ARTICLE VII.

Amendments.

- These laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias, by a two-thirds vote." (Printed record, p. 150.) And
- (4) In 1886, at its annual session at Toronto, Ontario, it passed, among others, a law providing rules for medical examiners, the applications for certificates of membership, and forms of certificates of membership, and further provided as follows:

"ARTICLE V.

Section 5. The power to adopt any additional forms, alter or amend any of the laws or the business details connected with the Endowment Rank, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the rank in detail, and to require on the part of all sections a strict conformity therewith.

ARTICLE VI.

Section 1. The funds of the Endowment Rank shall be as follows:

The endowment fund, which shall be derived from all the monthly assessments and from the special assessments when necessary.

Section 3. *Assessments may be ordered by the board of control whenever required by the necessities of the Endowment Rank.*" (Printed record, pp. 152, 153.) And

At the same time they further amended their laws as follows:

"ARTICLE XI.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge of Knights of Pythias of the World, by a two-thirds vote." (Printed record, p. 153.) And

- (5) Again in 1888 the old corporation amended its by-laws as follows, under the head "Powers of the Supreme Lodge":

"Section 1. It possesses the power, in accordance with the laws of the Order, to establish the Endowment Rank.

Section 6. To create, hold and disburse through a board of control, the funds of the Endowment Rank, under such regulations as may deem necessary." (Printed record, p. 153.)

It then prescribed, among other things, the form of application for membership, and the form of the certificate to be issued to the members. (Printed record, pp. 153, 154, 155.)

In addition thereto it amended article IV and made it read as follows, to wit:

"ARTICLE IV.

Monthly Assessments and Forfeiture of Certificate of Endowment.

Section 1. Each member of the Endowment Rank shall, on presenting himself for obligation, pay to the secretary of the section, in accordance with his age and the amount of endowment applied for, a monthly assessment, as provided for in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank; unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World. (Omitting table of monthly payments.)

Section 2. If at the time of the death of a member, the number of the members of said rank shall not be sufficient to pay in full the maximum amount of endowment held under the certificate of said deceased member, then there shall be paid to the beneficiary an amount equal to the proceeds of one full assessment made upon all the remaining members of the said Endowment Rank, less ten per cent., for expenses, and the payment of such sum to the beneficiary shall be in full of all claims and demands under and by virtue of said certificate." (Printed record, pp. 155, 156.)

ARTICLE VI.

Section 1. The funds of the Endowment Rank shall be placed to the credit of the Endowment Rank, which shall be derived from all assessments; from the membership fees; certificate fees; clearance card fees, from the sale of supplies and from all other sources of revenue.

Section 3. Special assessments may be made upon all members of the Endowment Rank by the board of control, when necessary to meet the liabilities of the Rank.

ARTICLE VII.

Section 5. The board shall have entire charge and full control of the Endowment Rank, subject to such restrictions as the Supreme Lodge may, from time to time, provide.

Section 9. The board is hereby authorized to enact

general laws, rules and regulations in conformity with this constitution for the government of sections and the membership of the Endowment Rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action.

Section 17. The board is hereby empowered and directed to rerate the members transferred from the first, second and third classes under resolutions passed by the Supreme Lodge at the session of 1884 permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third classes. The board is instructed to rerate this class of membership so as to require them to hereafter pay as of their age when becoming members of the fourth class, said rerating to take effect at such date as the board shall prescribe on and after the 1st day of August, 1888; and the board is further empowered to rerate the present table of the fourth class, applying it to all members, should such action become necessary for the proper protection and perpetuity of the rank." (Printed record, pp. 156. 157.)

Cases :

- Union Pac. R. Co. v. Myers, 115 U. S. 1, 25, 29 L. ed. 319;
- Messer v. Ancient Order United Workmen, 180 Mass. 321, 62 N. E. 252;
- Wineland v. Knights of the Maccabees, 148 Mich. 608, 112 N. W. 696;
- Williams v. Supreme Council, C. M. B. A., 152 Mich. 1, 115 N. W. 1060;
- Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154;
- Supreme Lodge, Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409;
- Barboř v. Mutual Reserve Fund Life Ass'n, 100 Ga. 681, 28 S. E. 498;
- Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208, 37 S. E. 854;
- Richmond v. Supreme Lodge, Order of Mutual Protection, 100 Mo. App. 8, 71 S. E. 736;

- Miller v. National Council, K. & L. of S., 69
Kans. 234, 76 Pac. 830;
Woodmen of the World v. Woods, 34 Colo.
1, 81 Pac. 261;
Shepperd v. Bankers' Union of the World, 77
Nebr. 85, 108 N. W. 188;
Conner v. Supreme Commandery, Golden Cross,
117 Tenn. 549, 97 S. W. 306;
Champion v. Hannahan, 138 Ill. App. 387;
Pierce v. Bankers' Union of the World, 140 Ill.
App. 495;
Mock v. Supreme Council Royal Arcanum, 121
App. Div. (N. Y.) 474;
Fullenwider v. Supreme Council Royal League,
73 Ill. App. 321, 331;
Fullenwider v. Supreme Council Royal League,
180 Ill. 621, 54 N. E. 485, 72 Am. Rep. 239;
Jones v. Knights of Maccabees, — Wash. —
(decided June, 1915);
Bartrum v. Supreme Council, Royal Arcanum,
6 Ont. W. R. 404;
Haydel v. Mutual Reserve Fund Life Ass'n,
98 Fed. 200;
Haydel v. Mutual Reserve Fund Life Ass'n, 104
Fed. 718.

Under the facts above stated and the authorities cited the correctness of our third proposition to the effect that the policy sued upon and the application therefor, the old policies for which it was substituted and the applications therefor, the charter and by-laws properly construed gave to the old Supreme Lodge the right to increase the rates in the event it should become necessary so to do should be conceded.

Point 4.

A mutual benefit company has the inherent right to amend and alter its by-laws, for

(1) It was so held in the case:

Supreme Lodge, Knights of Pythias v. Knight,
117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

Point 5.

The United States Statutes at Large provide such a power, because

- (1) It is not necessary to base the plaintiff in error's claim upon an implied right. Section 4 of the charter (28 Stat. at L., 96, 97) provides:

"That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendment thereof do not conflict with the laws of the United States or of any state." (Printed record, p. 95.)

Under the power so granted the plaintiff in error has the express power to change its rates to make them conform to what the experience of the insurance world shows to be safe and necessary.

See cases under Point 3.

Point 6.

The authority to increase assessments so given was repeatedly exercised, for

- (1) On March 1, 1894, and before the incorporation of plaintiff in error, the rates were increased five cents per \$1,000. (Printed record, p. 126.) Again
- (2) On September 1, 1901, the National fraternal rates were adopted, changing the old rates. (Printed record, pp. 126, 127.) Again
- (3) In addition to that seven special assessments were made before the raise in rates in 1910, the first, July, 1892, two years before the incorporation of plaintiff in error; the others May, 1901, February, 1909, September, 1909, March, 1910, May, 1910, and July, 1910.

ISSUE IV.

The defendant in error has estopped himself from denying the right of the plaintiff in error to increase the rates of assessment as in 1910, if necessary, for

Point 1.

The original certificates were offered upon an express condition of payment to the Endowment Rank of all assessments as required and in full compliance with all the laws

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governing the Rank then in force or that might thereafter be enacted, for

- (1) The declaration of the old corporation in 1888, in Art. VII, Sec. 17, reads as follows:

"Section 17. The board are hereby empowered and directed to rerate the members transferred from the first, second and third classes under resolution passed by the Supreme Lodge at the session of 1884 (which was the one under which he obtained the certificate sued on), permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third classes.

Also section 9 of Art. VII, passed at the same date, provides as follows:

"Section 9. The board is hereby authorized to enact general laws, rules and regulations in conformity with this constitution for the government of sections and the membership of the Endowment Rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action." (Printed record, p. 156.)

So also it must be borne in mind that the certificate sued on contained a similar provision, though stronger, to the effect that it was issued, among other things, "in consideration of the payment hereafter to said Endowment Rank of all monthly payments, and a full compliance with all the laws governing this Rank now in force or that may hereafter be enacted."

Point 2.

The defendant in error accepted the insurance with a full knowledge that unless the membership was kept up the assessments must necessarily increase, because

- (1) He testified to such knowledge upon the witness stand as shown in his testimony, to wit:

"If you reduced the membership to two thousand and the death rate increased as they grew older, you certainly would have to increase that rate if you meet the obligations. I do not remember whether they raised the rates on me in

1888 and 1901. They raised them so often that I can not remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910." (Printed record, p. 121.)

And, again,

"I presume that the organization was not for profit, but for the protection of the individual members constituting the insurance circle. I suppose that the *only source of revenue* to meet my policy and other policies issued by the insurance department would be obtained from assessments on those insured. I also presume that if I realized on my policy the assessments would have to be sufficient to meet the death claims on the death of the membership. I knew *that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase.* I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be less per head on those five thousand members than it would be when the ranks had been reduced to two thousand. As the membership decreased the death rate increased and they would be obliged to increase the assessments. If they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance scheme was based on the assessment plan." (Printed record, pp. 120, 121.)

Point 3.

He also acquiesced to this principle and demand by paying such increased assessments from time to time, for

(1) His own testimony shows this, to wit:

"They raised them so often that I can not

remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise when I declined." (Printed record, p. 121.)

It would seem, therefore, that by contemporaneous construction it was conceded on both sides that the Supreme Lodge and the board of control had the right to increase the rates whenever necessity required. It must, therefore, follow that if the plaintiff in error assumed the contract of the old corporation it assumed it with the interpretation placed on it by both parties thereto, to wit, that if it became necessary in order to carry out the contract for it to increase the rates charged for insurance, it would have that authority.

Cases:

Wineland v. Knights of the Maccabees, 148 Mich. 608, 112 N. W. 696;
Gibbs v. Supreme Lodge, Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11;
Manning v. San Antonio Club, 63 Tex. 166, 51 Am. Rep. 639;
29 Cyc. 70.

CONCLUSION.

We submit that the judgment of the court of civil appeals brought here for review is a most unrighteous one. It in effect holds plaintiff in error responsible for a contract made by an old corporation and the defendant in error.

It was proved that the new corporation got no funds or any property from the old corporation, or from the unincorporated society. (Printed record, p. 162.) That it got nothing from the old corporation is not directly stated in the testimony, but it is clearly inferred. The witness, Powers, does state emphatically that plaintiff in error got nothing from the unincorporated society, which succeeded the old corporation. We, therefore, submit that it got nothing from the old corporation.

The contract and all the preliminary acts leading up to it, the charter, by-laws of the old corporation, the language of the application of the defendant in error for the certificate, and the then opinion of the defendant in error as shown by his own testimony all agreed that the old corporation had the right to increase its rates, if necessary—and that it would probably be necessary to increase them. This was acted upon,

and the rates were increased from time to time, and they were paid by the defendant in error. If the plaintiff in error assumed that contract it assumed it with the construction which the parties thereto had placed upon it. Later the record discloses that the plaintiff in error increased its rates, and the defendant in error testifies that he paid them all up until 1910. They were again increased because it was found necessary, and as to this fact there is no dispute. They were obliged to increase the rates or else refuse to pay the amount of the certificates. The rates were increased. The defendant in error repudiates all of his promises in his application for insurance, repudiates the language of his certificates that he would pay all the dues and monthly assessments required, and repudiates his construction of the contract of the old corporation, and proceeded to sue plaintiff in error—a fraternal organization doing business and making no profit—for all the money that he had paid into the treasury. He lost sight of the principle enunciated by this court in the Korn case, 6 Cranch. (U. S.) 192, 3 L. ed. 195, that his relations to this organization are dual; that he was the insurer of each of his brother Knights of Pythias, as they were insurers of him; and that the greater part of the moneys that he had paid into the treasury of the Order of the Supreme Lodge, Knights of Pythias, had been distributed in the payment of death benefits which he was obligated to pay as much as any member of the Knights of Pythias. But notwithstanding that fact the courts of last resort in Texas have held that he can recover from the Order all of the moneys that he has paid into the treasury and that have been distributed on obligations of his own creation. The injustice of this is apparent. It means that if one thousand young men in the prime of life should enter into a mutual obligation to insure each other's lives for three thousand dollars (\$3000) each, and that when a member dies the one thousand members would assess themselves practically three dollars (\$3) each to pay that policy. They would know when they entered into this obligation that if an epidemic should sweep away half of their number, they must double their assessments. They entered into the agreement with the full knowledge of that fact, just as Mims did when he entered into this contract. But suppose these one thousand men continue their organization? From time to time a member dies, and his place is taken by a new member, the membership always being kept to one thousand. But suddenly an epidemic of yellow fever sweeps five hundred of them into eternity. The other five hundred have to pay these death losses. It is

manifest that they must increase their rates, or not pay the beneficiaries the full three thousand dollars (\$3000). They do increase the rates for that purpose. One hundred of the remaining five hundred rebel. They say they do not indorse this increased rate, though they knew when they joined that the increase would probably be necessary. They gave to the lodge repeatedly over and over power to change its laws; they not only did that, but they voluntarily agreed to change the rates from time to time, but that they will not now permit any other changes. Not only do they object, but they bring suit against the organization for every cent that has been heretofore paid out to families of deceased members on an obligation created by themselves. They expect the court to give them a judgment for the amount of these dues thus paid, with interest thereon from the dates of payment. All because what? Because the organization has done what they felt sure it would probably be obliged to do at the date when they became parties to the contracts which it had made. Surely, that can not be the law. It is the essence of unfairness, as the authorities heretofore cited conclusively demonstrate.

We submit, therefore, that the judgment of the Honorable Court of Civil Appeals should be reversed and here rendered in favor of plaintiff in error and against defendant in error, for all of which it prays.

.....,

 Attorneys for plaintiff in error,
 Supreme Lodge, Knights of Pythias.

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